No. 90-1390

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

GENERAL MOTORS CORPORATION, ***Petitioner***

v.

EVERT ROMEIN, ET AL., ***Respondents***

FORD MOTOR COMPANY, ***Petitioner***

v.

ARTURO GONZALEZ, ET AL., ***Respondents***

On Petition For A Writ Of Certiorari To The Supreme Court Of Michigan

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In 1981, the State of Michigan enacted a statute providing that the amount of workers' compensation benefits paid after March 31, 1982, would be reduced by the amount of any other employer-financed income replacement benefits, such as pensions. In 1985, the Michigan Supreme Court ruled that this statute applied to all payments to be made to employees, whether they were injured before 1982 or thereafter. In 1987, however, the Michigan legislature amended the 1981 statute retroactively, eliminated the offset provision as applied to pre-1982 injuries, and required employers to reopen all such claims paid between 1982 and 1987 and to refund, with interest, any amounts that were lawfully withheld pursuant to the 1981 statute.

The questions presented are as follows:

1. Whether the 1987 Michigan statute retroactively imposing liability for additional workers' compensation benefits for closed disability periods violates the Impairment of Contracts Clause (Art. I, § 10) of the United States Constitution.

2. Whether the 1987 Michigan statute retroactively imposing liability for additional workers' compensation benefits for closed disability periods violates the Due Process Clause of the Fourteenth Amendment.

PARTIES TO THE PROCEEDING AND RULE 29.1 STATEMENT

In addition to the parties listed in the caption, Frank J. Kelley, the Attorney General of Michigan, intervened in these cases, was an appellee in the Supreme Court of Michigan, and is a respondent in this Court. Ford Motor Company's non-wholly owned subsidiaries are listed in Appendix G, *infra*, 93a. General Motors Corporation's non-wholly owned subsidiaries are listed in Appendix H, *infra*, 97a.

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Petitioners General Motors Corporation (GM) and Ford Motor Company (Ford) petition for a writ of certiorari to review the judgment of the Supreme Court of Michigan.

OPINIONS BELOW

The decision of the Supreme Court of Michigan (App., *infra*, 1a-57a) is reported at 436 Mich. 515, 462 N.W.2d 555. The decision of the Michigan Court of Appeals (App., *infra*, 58a-69a) is reported at 168 Mich. App. 444, 425 N.W.2d 174.

JURISDICTION

The judgment of the Supreme Court of Michigan was entered on September 28, 1990 (App., *infra*, 1a), and a petition for rehearing was denied on December 5, 1990 (App., *infra*, 72a). The jurisdiction of this Court rests on 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant provisions of the United States Constitution and the Michigan workers' compensation statute are set forth at App., *infra*, 88a-92a.

STATEMENT

From 1982 to 1987, petitioners—employers in the State of Michigan—satisfied their contractual obligations to pay workers' compensation benefits to disabled employees by making full payments in the amounts provided by state statute, as authoritatively construed by the Supreme Court of Michigan. In 1987, however, the Michigan legislature, expressly disagreeing with the state supreme court's construction of state law, enacted a new statute that retroactively increased the amount of workers' compensation benefits for payment periods back to 1982. The issue in this case is whether the 1987 law, imposing massive un-

foreseen financial liabilities on employers, is consistent with the requirements of the Contract Clause and the Due Process Clause of the United States Constitution.

1. *The 1981 Statute.* During the late 1970s and early 1980s the State of Michigan was mired in an economic crisis. As Chief Justice Riley described the situation: "Michigan had been struggling through a severe recession. A significant number of businesses either were closing down their local operations or leaving the state. The unemployment rate in Michigan during December 1981, was 14.4 percent, and the 1981 inflation rate for the City of Detroit in 1981 was 9.3 percent." App., *infra*, 31a-32a (Riley, C.J., dissenting) (footnotes omitted). It was against this economic backdrop that the Michigan legislature in 1981 passed a series of amendments to the Michigan Workers' Compensation Act. These changes were designed to curb expensive abuses in the system and thereby to "stimulate a poor state economy by lowering the cost of doing business in Michigan." *Id.* at 31a.

The primary abuse that the 1981 statute addressed was the ability of retired employees to collect workers' compensation benefits in addition to retirement benefits, and thereby to earn more money "disabled" than they would have received if they had never been injured. As the Michigan Supreme Court explained:

> "For many years the most hotly discussed topic concerning the Michigan workers' compensation system was the so-called 'retiree problem.' * * * If the retiree could demonstrate that he or she had incurred a disability caused by pre-retirement job activity or working environment (a bad back from 30 years on the assembly line or a dust disease from 30 years in a foundry), the retiree was entitled to workers' compensation. * * * In 1973 the Big Three (General Motors, Ford and Chrysler) paid out $51 million in wage loss benefits, of which $24 million, or 47 percent, went to retirees. * * * With such a large part

> of the compensation dollar going to persons who were no longer part of the active work force, it was inevitable that reforms would be demanded."

Franks v. *White Pine Copper Div.*, 375 N.W.2d 715, 724 (Mich. 1985) (quoting official state study; citation omitted). Indeed, in 1981, Michigan Governor William Milliken called the "retiree problem" the "biggest single liability to Michigan's job climate today." *Id.* at 723.

The Michigan legislature responded to this crisis by enacting 1981 PA 203 on December 30, 1981. This statute amended MCL 418.354 to provide for the "coordination" of workers' compensation benefits with various other employee benefit programs funded by employers.[1] For example, the 1981 statute allowed employers to offset workers' compensation payments by the amounts that an employee was otherwise receiving from employer-financed pension plans, employer contributions to social security, or payments received from an employer-provided disability policy. Because of the coordination of benefits, employees would no longer be allowed to "receive wage-loss benefits from two, three, or four different programs providing a total wage 'replacement' greater than the wages the employee earned while on the job." *Franks*, 375 N.W.2d at 723.

2. *Interpretation of the 1981 Statute.* In *Chambers* v. *General Motors Corp.* (reported together with *Franks* at 375 N.W.2d 715 (Mich. 1985)), the Michigan Supreme Court reviewed the plain language and history of the 1981

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[1] This statute was one of a series of reforms Michigan instituted during 1980 and 1981. For example, in 1980, the legislature provided for coordination of workers' compensation benefits with unemployment benefits. See 1980 PA 357, MCL 418.358. Also in 1980 the legislature raised the maximum disability benefit for employees injured after January 1, 1982. See MCL 418.351. Another provision of the 1980 amendments created a state-funded cost-of-living supplement for employees injured between 1965 and 1979. See MCL 418.352. These supplemental benefits are not subject to coordination.

statute and held unanimously that the coordination provision applied to all workers' compensation payments made for disability periods *after* the statute's effective date of March 31, 1982, regardless of the date of the employee's injury. The court explained that coordination of future payments did not constitute a retrospective interference with any rights of the employees, because workers' compensation focuses on the workers' needs and status as of each new payment period. See *Chambers*, 375 N.W.2d at 722 (" 'it is not contended that compensation benefits should be retroactively coordinated or reduced. Rather it is argued that the benefits of *all* disabled workers should be *prospectively* coordinated after the effective date of the enactment *regardless of when they were injured.*' " (emphasis in original) (citation omitted)).

At the same time, however, the Michigan Supreme Court announced that employers could not reduce payments that they still owed employees for disability periods occurring *before* the coordination provision's effective date of March 31, 1982. To allow this type of retrospective coordination, the court explained, would be to retroactively adjust payments that were "due" and thus "payable" prior to the effective date of the statute. *Chambers*, 375 N.W.2d at 730.

3. *The 1987 Amendment.* During the mid-1980s, the economic climate in Michigan improved considerably. As Chief Justice Riley observed, in 1987 "[t]he level of unemployment was 8.2 percent (down from the 1981 level of 14.4 percent), and the 1987 inflation rate for the City of Detroit was 3.0 percent (down from the 1981 level of 9.3 percent)." App., *infra*, 35a (footnotes omitted). Moreover, the Michigan legislature in 1987 was quite different from the one that had passed the coordination provision in 1981. Only 11 of the 26 senators and 20 of the 62 representatives who had voted for the 1981 statute were still in office. See *id.* at 36a.

In this changed economic and political environment, and with the sponsorship and support of organized labor, the

Michigan legislature revisited the coordination issue in 1987 and enacted an amendment to the workers' compensation statute designed to overrule the Michigan Supreme Court's decision in *Chambers* and to disallow coordination of benefits for employees who had been injured prior to the 1981 statute's effective date of March 31, 1982. See App., *infra*, 90a-92a. The amendment explicitly declared:

> The decision of the Michigan Supreme Court in [*Franks* and *Chambers*] is declared to have been erroneously rendered insofar as it interprets this section, it having been and being the legislative intention not to coordinate payments under this section resulting from liability * * * for personal injuries occurring before March 31, 1982.

1987 PA 28, section 354, subsection 17.

The 1987 amendment did far more, however, than merely abolish coordination of *future* workers' compensation payments for employees disabled prior to March 31, 1982. The 1987 legislature also repealed the 1981 coordination provision *retroactively* by requiring employers to make *refunds*, with interest, to all employees whose benefits had been coordinated during the five-year period that the 1981 statute was in effect. See 1987 PA 28, section 354, subsections 19 & 20. Employers were given 60 days to make these massive refunds, which in the case of petitioners GM and Ford alone could amount to nearly $25 million. See App., *infra*, 53a (Griffin, J., dissenting). The constitutionality of this extraordinary new measure was challenged in a series of cases that culminated in the cases now before the Court.

4. *The Romein and Gonzalez Cases.* Evert Romein was injured in 1977 during his employment with General Motors. Prior to the 1981 statute, Romein received social security and pension benefits, as well as workers' compensation benefits on account of his disability. After the effective date of the 1981 statute, GM informed Romein that it would begin coordinating his workers' compensation

benefits with these other employer-financed payments. Romein challenged this decision, and an administrative law judge ruled in his favor, holding that the coordination provision applied only to employees who were injured after its effective date of March 31, 1982. By the time the case was heard by the Workers' Compensation Appeal Board (WCAB), the Michigan Supreme Court had already rejected this argument in *Chambers*, and the WCAB therefore ruled that GM was entitled to coordinate payments to Romein for periods after the 1981 statute's effective date. App., *infra*, 74a-80a.

Arturo Gonzalez, a Ford employee, began to receive workers' compensation benefits on January 1, 1981. On August 9, 1982, Ford informed Gonzalez that his benefits would be reduced in light of the 1981 statute. In September 1984, however, an administrative law judge ruled against Ford, holding that the coordination provision could not be applied to pre-1982 injuries. The WCAB affirmed. The Board concluded that although *Chambers* had construed the 1981 statute to permit the coordination of Gonzalez' benefits, that decision had been "reversed" by the 1987 amendment. App., *infra*, 81a-87a.

5. *The Court of Appeals' Decision.* *Romein* and *Gonzalez* were consolidated by the Michigan Court of Appeals, because they raised the identical issue: the constitutionality of the 1987 amendment, which retroactively required employers to reopen closed workers' compensation claims and to make additional payments, with interest, in excess of the amounts they were legally obliged to pay between March 31, 1982 and May 14, 1987, the date the 1987 amendment was enacted. The court rejected GM's and Ford's contentions that retroactive application of the 1987 amendment violated the Due Process and Impairment of Contracts Clauses of the United States Constitution. App., *infra*, 64a-66a. The court reasoned that "[t]he right to coordinate workers' compensation benefits relied upon by GMC and Ford was conferred by the Legislature and was

revoked by the Legislature. What the Legislature gave, it could take away." *Id.* at 66a.

6. *The Michigan Supreme Court's Decision.* A divided Michigan Supreme Court affirmed. The majority first rejected petitioners' contention that the 1987 amendment violated due process. In the court's view, GM and Ford acquired no "vested rights" in the level of payments they had made because "workers' compensation benefits and liabilities are statutory in origin and may be revoked or modified at the will of the Legislature." App., *infra*, 13a. The court recognized that the

> employers in this case held an expectation that the payments [made between 1982 and 1987] were completed transactions. We do not accept, however, their contention that if parties have patterned their past conduct in reliance on past law, they have a vested right to have the legality of that conduct determined under law then in effect. The rational relationship test applies to economic legislation whether it is retroactive or not.

Id. at 9a. The court found such a "rational relationship" by hypothesizing that the legislature may have wanted to ensure that employees who were not covered by a 1980 statute that increased benefits for injuries occurring after 1982 would not have their benefits subjected to coordination. *Ibid.*

The Michigan Supreme Court also rejected petitioners' argument that the 1987 amendment worked an unconstitutional impairment of the contractual arrangements between the employers and their employees. The court first ruled that "benefits and liabilities in the workers' compensation statute do not create rights protected by the Contract Clause." App., *infra*, 14a. Even if the Contract Clause applied, however, the court concluded that the 1987 legislation would survive scrutiny. To begin with, the court held that any impairment caused by the statute was not "substantial" because it did not destroy the "basic

benefit" that employers received from the workers' compensation scheme—immunity from tort actions by their employees. *Id.* at 15a. In addition, the court suggested that any impairment was diminished by the "highly regulated" nature of the employment relationship. *Id.* at 15a-16a.

The Michigan Supreme Court next considered whether any impairment of contract could be justified by a "legitimate public purpose" and concluded that "[t]here is a significant state interest in protecting the right of disabled employees." App., *infra*, 16a. Speculating again on the motivation for the 1987 amendment, the court stated that "[t]he Legislature could have reasonably found that the coordination of benefits caused hardship among the employees whose injury dates were before 1982 since these employees were not entitled to the overall increase of benefits provided for those injured after 1982." *Id.* at 17a.

Finally, the Michigan Supreme Court considered the "means by which the contracting parties' rights and responsibilities [were] adjusted" and determined that "[t]he means chosen here are reasonable in the light of deference given to legislative action." App., *infra*, 17a. The court explained that "the statute imposes no more retroactive liability than is necessary to remedy an unexpected circumstance relating to the interpretation of a prior statute." *Ibid.*

Justice Brickley "reluctantly" concurred in the judgment. He stated that

> [t]roubled though I am by the 1987 amendments at issue here, reaching back as they do to rewrite the past by altering the past consequences of past transactions, the lamentable failure of the United States Supreme Court to articulate any discernible limits on the constitutionality of retroactive civil, economic legislation forecloses the conclusion that the 1987 amendments violate the Due Process Clause of the Fourteenth Amendment.

App., *infra*, 22a.

Justice Griffin dissented, based on his "strong view" that the 1987 amendment "contravenes the United States Constitution's Fourteenth Amendment due process guarantee." App., *infra*, 47a. After reviewing some of the retroactive enactments that have survived judicial scrutiny in the past, Justice Griffin remarked that the "[l]egislation scrutinized in those cases does not compare to the enactment here which was deliberately designed to disrupt retroactively past transactions completed in reliance upon this Court's specific holding in *Chambers* that all workers' compensation payments were subject to * * * coordination regardless of the date of injury." *Id.* at 50a.

REASONS FOR GRANTING THE PETITION

The Framers of the Constitution were justifiably concerned with "the fluctuating policy which has directed the public councils." *Federalist* No. 44 (Madison), at 282 (C. Rossiter ed. 1961). Accordingly, they included the Contract Clause and the Due Process Clause in the Constitution to protect against legislative interference with settled legal rights. Under the Michigan Supreme Court's analysis, however, there are no constitutional barriers to a legislative enactment that changes previously settled law and imposes unforeseen liability on parties who have contracted or otherwise shaped their behavior in reliance on that law. If, as the court below held, mere "rationality" is the test for evaluating such measures, then virtually any enactment—even one as disruptive of past transactions and expectations as the 1987 amendment—would be immune from constitutional scrutiny.

Review is warranted here because the Michigan Supreme Court's decision cannot be squared with this Court's precedents, conflicts with the decisions of other courts on the applicability of the Contract Clause in the workers' compensation context, and exacerbates the confusion in the lower courts on the standards for judging retroactive

legislation. The need for review is especially acute with respect to the Contract Clause. The lower courts have gotten the mistaken message in recent years that the Contract Clause no longer poses any meaningful impediment to retroactive impairments of contractual obligations. The Court should use this occasion to reaffirm the principle, true to the text and history of the Clause, that any state enactment interfering with settled contract rights must satisfy an extremely heavy burden.

Prior to the repeal of this Court's appellate jurisdiction, this case would have qualified for plenary review, because a state court has rejected a federal constitutional attack on the validity of a state statute. See 28 U.S.C. § 1257(a) (1988). Even though review of such cases is no longer mandatory, this factor should still be an appropriate one in shaping the Court's exercise of discretion when the case raises significant constitutional issues, as this one decidedly does.

I. THE CONTRACT CLAUSE PROHIBITS A STATE FROM RETROACTIVELY REOPENING SETTLED WORKERS' COMPENSATION CLAIMS YEARS AFTER PAYMENTS HAVE BEEN MADE IN COMPLIANCE WITH THE LAW THEN IN EFFECT.

The Michigan Supreme Court gave two reasons for rejecting petitioners' Contract Clause challenge to the 1987 amendment. First, the court held that the Contract Clause does not apply to retroactive modifications of workers' compensation laws, even though workers' compensation benefits are generally recognized as contractual in nature. Second, the court held that even if there was an impairment of contract, it was insubstantial and was justified by a legitimate state interest. Both of these conclusions are severely flawed and reflect the disarray and confusion that currently confront the lower courts in trying to apply this Court's Contract Clause jurisprudence.

A. Workers' Compensation Programs Create Contractual Interests Protected By The Contract Clause.

The Michigan Supreme Court's initial conclusion—that there is no constitutionally protected contractual interest at stake here—is in direct conflict with a substantial line of federal and state precedents recognizing that the Contract Clause governs retroactive statutory modifications in the workers' compensation area. In *Nieves* v. *Hess Oil Virgin Islands Corp.*, 819 F.2d 1237, 1244 (3d Cir. 1987), for example, the Third Circuit held that the Contract Clause was violated by a retroactive amendment to the Virgin Islands Workmen's Compensation Act because the amendment "substantially impair[ed] * * * implied contracts of employment." See also, *e.g.*, *Mitchell* v. *United States Fidelity & Guaranty Co.*, 206 F. Supp. 489, 490 (E.D. Tenn. 1962); *Harris* v. *National Truck Service*, 321 So. 2d 690, 693-694 (Ala. App. 1975); *Spengler* v. *Employers Commercial Union Ins. Co.*, 206 S.E.2d 693 (Ga. App. 1974); *Estate of Baker*, 563 P.2d 431 (Kan. 1977); *McNeese Constr. Co.* v. *Harris*, 273 S.W.2d 355, 357 (Ky. 1954); *Cooper* v. *Wicomico County*, 366 A.2d 55, 58 (Md. 1976); *Miller* v. *Norris Creameries*, 250 N.W.2d 161, 162 (Minn. 1976); *Carmichael* v. *Workers' Compensation Court*, 763 P.2d 1122 (Mont. 1988); *Noffsker* v. *K. Barnett & Sons*, 384 P.2d 1022, 1023 (N.M. 1963); *In re Injury to Spera*, 713 P.2d 1155, 1156-1157 (Wyo. 1986).

The analysis generally employed by these courts is consistent with this Court's conclusion in *State Industrial Comm'n* v. *Nordenholt Corp.*, 259 U.S. 263 (1922), that an award of workers' compensation is made

> "upon the theory that the statute giving the commission power to make an award *is read into and becomes a part of the contract.* The contract of employment, by virtue of the statute, contains an implied provision that the employer, if the employee be injured, will pay to him a certain sum to compensate for the injuries sustained, or if death results, a cer-

> tain sum to dependents. These payments are made irrespective of whether or not the employer was guilty of wrongdoing. It is a part of the compensation agreed to be paid for services rendered in the course of the employment."

Id. at 271 (emphasis added) (quoting *Doey* v. *Howland Co.*, 120 N.E. 53, 54 (N.Y. 1918)). See also *Nacirema Co.* v. *Johnson*, 396 U.S. 212, 215 n.7 (1969) ("workmen's compensation act combines elements of both tort and contract").[2]

This analysis is surely correct. Workers' compensation statutes are not general police power regulations that govern businesses without regard to their contractual agreements to employ workers. Rather, workers' compensation laws come into play only after an employer and employee have entered into an employment agreement that triggers the act's provisions. The workers' compensation scheme then becomes part of the contractual agreement as much as if the parties had themselves included the terms on the face of their employment contract.[3] As this Court has stated:

> The obligations of a contract long have been regarded as including not only the express terms but also the contemporaneous state law pertaining to interpretation and enforcement. "This Court has said that 'the laws which subsist at the time and place of the mak-

[2] To be sure, there is some tension between these descriptions and the one offered by the Court in *Cudahy Co.* v. *Parramore*, 263 U.S. 418, 423 (1923), which referred to workers' compensation legislation as resting on the idea of status, not contract. This tension is one of the principal sources of the disarray that continues to pervade the lower courts. See *Prevost* v. *Hess Oil Virgin Islands Corp.*, 640 F. Supp. 1220, 1223 n.7 (D.V.I. 1986).

[3] Indeed, many employment contracts in Michigan (including the collective bargaining agreement between GM and the United Auto Workers) explicitly incorporate various workers' compensation provisions, with modifications as agreed to by the parties. See, *e.g.*, Supplemental Agreement Covering Pension Plan, Art. IV, Sec. 2, Appendix A to Agreement Between GM and UAW (Mar. 21, 1982).

> ing of a contract, and where it is to be performed, enter into and form a part of it, as if they were expressly referred to or incorporated in its terms.' "

United States Trust Co. v. *New Jersey*, 431 U.S. 1, 19-20 n.17 (1977) (quoting *Home Building & Loan Ass'n* v. *Blaisdell*, 290 U.S. 398, 429-430 (1934)).[4]

Nonetheless, a substantial number of courts have rejected this approach and have held that the Contract Clause does not govern retroactive impairments of obligations in the workers' compensation area. See, *e.g.*, *Kaiser Found. Hosp.* v. *Workers' Compensation Appeals Bd.*, 151 Cal. Rptr. 368, 376 (App. 1978); *Price* v. *All American Engineering Co.*, 320 A.2d 336, 339-340 (Del. 1974); *Barnes* v. *Commissioner of Dep't of Human Services*, 567 A.2d 1339 (Me. 1989); *K-Mart Corp.* v. *State Industrial Ins. Sys.*, 693 P.2d 562, 565-567 (Nev. 1985); *McAllister* v. *Board of Educ.*, 191 A.2d 212, 217-218 (N.J. Super. 1963), aff'd, 198 A.2d 765 (N.J. 1964); *Wood* v. *J.P. Stevens & Co.*, 256 S.E.2d 692 (N.C. 1979); *Jenkins* v. *Sal Chemical Co.*, 280 S.E.2d 243, 244 (W. Va. 1981).

The severity of the conflict among the lower courts on this issue is beyond question. See *Prevost*, 640 F. Supp. at 1223 ("[j]urisdictions, including the Supreme Court, appear evenly divided between these two theories and we find no clear trend in either direction"). It is equally apparent that this is a conflict that demands the Court's attention. Millions of employers and employees are affected by workers' compensation statutes on a continuing basis. It is essential to know whether state laws may alter those contractual relationships retroactively—such as by

[4] The Michigan courts generally recognize that the terms of the workers' compensation statute become part of the contract of employment. See, *e.g.*, *Selk* v. *Detroit Plastic Products*, 345 N.W.2d 184, 188, clarified, 348 N.W.2d 652 (Mich. 1984); *Thomas* v. *Parker Rust Proof Co.*, 279 N.W. 504 (Mich. 1938); *Brown* v. *Eller Outdoor Advertising Co.*, 360 N.W.2d 322 (Mich. App. 1984).

increasing (or decreasing) the benefits due for a prior time period after full payment has been made in accordance with the law then in effect. Guidance from this Court is sorely needed.

B. The Impairment In This Case Violated The Contract Clause.

Perhaps because it recognized the tenuousness of its conclusion that no contractual interest was at stake here, the Michigan Supreme Court proceeded to evaluate whether the impairment caused by the 1987 amendment could be justified under the Contract Clause test that this Court has adopted over the past few decades. See App., *infra*, 15a-17a. In these cases, the Court has balanced the substantiality of the contractual impairment (*Energy Reserves Group* v. *Kansas Power & Light Co.*, 459 U.S. 400, 411 (1983); *Allied Structural Steel Co.* v. *Spannaus*, 438 U.S. 234, 244 (1978)), the legitimacy of the public purpose for the impairment (*Energy Reserves*, 459 U.S. at 412), and the reasonableness of the means chosen to serve that purpose (*United States Trust Co.*, 431 U.S. at 25).

As we explain below (see pages 21-23, *infra*), we question whether this formulation is faithful to the plain language or original understanding of the Contract Clause. But the statute at issue here cannot satisfy even this watered-down standard of review.

1. *The Substantiality of the Impairment.* Despite the fact that the 1987 amendment could cost GM and Ford $25 million in additional workers' compensation payments for *closed benefit periods*, the Michigan Supreme Court concluded that the impairment here was not "substantial." App., *infra*, 15a. To begin with, the court below observed that petitioners continued to receive the "basic benefit" of the workers' compensation scheme—immunity from employees' common law tort claims. "Since the impairment complained of in this case does not alter this basic

benefit to the employer, it cannot be said to be substantial." *Ibid.* This analysis is nonsensical because it would presumably allow the legislature to impose any amount of retroactive workers' compensation liability on an employer provided that it did not make the employer subject to a tort suit. Moreover, the state court's reasoning is flatly inconsistent with this Court's statement that "[t]otal destruction of contractual expectations is not necessary for a finding of substantial impairment." *Energy Reserves Group*, 459 U.S. at 411 (citing *United States Trust Co.*, 431 U.S. at 26-27). Rather, the inquiry into substantiality involves an assessment of the "legitimate expectations of the contracting parties." 431 U.S. at 20 n.17.

If the Michigan Supreme Court had engaged in the proper inquiry, it would have been forced to recognize that the 1987 amendment upset settled expectations and deprived employers of a significant part of their contractual bargain. In light of the 1981 statute, particularly as construed by the state's highest court in *Chambers*, employers plainly were entitled to rely on the fact that the coordinated workers' compensation payments they made between 1982 and 1987 fully satisfied their contractual obligations. See *Minnesota Ass'n of Health Care Facilities* v. *Minnesota Dep't of Public Welfare*, 742 F.2d 442, 451 (8th Cir. 1984) (upholding prospective adjustment but striking down retroactive adjustment in nursing home rates under the Contract Clause because it imposed "totally unexpected liability on nursing homes for charges that were permitted by law when collected" and thus "disrupt[ed] settled and completed financial arrangements under contracts made in reliance on existing law"). In fact, employers in Michigan relied on those expectations in making a variety of financial decisions, particularly those involving the allocation of employee compensation. See note 3, *supra*. By retroactively prohibiting coordination between 1982 and 1987 for a large category of former employees, the 1987 amendment imposed unexpected liabilities and worked a serious impairment of contract.

The second basis for the Michigan Supreme Court's conclusion is equally defective. The court held that there was no substantial impairment because the "workers' compensation statute regulates a field of commerce that has been subject to a wide-ranging and comprehensive scheme of government regulation * * * [so that the] defendants knew that their rights were subject to alteration." App., *infra*, 16a. But the fact that employment may be highly regulated does not mean that the contracting parties cannot maintain a reasonable expectation of finality with respect to fully satisfied claims for past periods of disability. Indeed, the workers' compensation statute itself creates such expectations: for example, although the legislature retains the power to alter benefit levels *prospectively*, the statute expressly provides that "no compensation shall be ordered for any period which is more than 1 year prior to the date of filing [of an application for additional compensation]." MCL 418.833(1); see also *Franks*, 375 N.W.2d at 730 (refusing to allow retroactive coordination of benefits for pre-1982 periods). In the 75-year history of workers' compensation in Michigan, this was the first time the legislature had ever sought to reopen past claim periods to increase employer liability. Thus, Michigan employers had a justifiable expectation that, although their liability for *future* pay periods might be altered, their liability for *past* periods could not be retroactively increased. See *Fisk* v. *Jefferson Police Jury*, 116 U.S. 131, 133-134 (1885).[5]

[5] Michigan employers had no reason to anticipate that the legislature might enact a law requiring retroactive reimbursements of amounts they had lawfully withheld. To begin with, the 1982 legislature had actually defeated a proposal to amend the 1981 statute and to disallow prospective coordination for those injured prior to 1982. See App., *infra*, 36a-37a (Riley, J., dissenting). Moreover, even the 1987 amendment did not contain a retroactive reimbursement clause (much less a five-year retroactivity clause) until eight days prior to its enactment. See SB67, introduced May 7, 1987, 1987 Journal of the House 1062-1063. Compare *PBGC* v. *R.A. Gray & Co.*, 467 U.S. 717, 731 (1984) (emphasizing fair notice to industry and the reasonableness of a five-month retroactivity period).

According to the Michigan Supreme Court, however, the only time an employer has a protected expectation that it has fully satisfied its workers' compensation obligation for a past period is when a judgment has been entered adjudicating the employer's liability for that period. App., *infra*, 14a. This conclusion ignores the fact that once the 1981 statute was passed, and certainly once the coordination issue was authoritatively decided in the employers' favor in *Chambers*, there was no reason for employers or employees to litigate the issue, and hence there were no "judgments entered under former law" in the great majority of cases.[6] In sum, employers had well-settled expectations of finality when they made workers' compensation payments in the exact amount prescribed by state statute, without the need for further administrative or judicial review.

2. *The Legitimacy of the Public Purpose.* Because the 1987 amendment substantially impaired petitioners' contractual relationships, the validity of the statute turns on the Michigan Supreme Court's rather nonchalant conclusion that the enactment was justified by a "legitimate public purpose." App., *infra*, 16a. In the Michigan court's view, this burden was satisfied because, "rather than merely providing a benefit to special interests, the state is validly exercising its police power. There is a significant state interest in protecting the right of disabled employees to receive the full compensation intended by

[6] Indeed, it was the Michigan Supreme Court's own decision in *Chambers* that held that employers need not invoke any judicial process—and hence need not acquire any final judgment—before beginning to coordinate their employees' benefits. See 375 N.W.2d at 726 ("the Legislature has provided that the employer may coordinate benefits without prior administrative approval"). It is perverse to conclude that those employers who followed the law and procedure explicitly approved by the state's highest court possessed no reasonable expectations simply because their unquestioned legal rights were never reduced to judgment. See App., *infra*, 53a (Griffin, J., dissenting).

the Legislature in return for the relinquishment of their tort claim." *Ibid.*

This assertion is plainly insufficient to satisfy the demands of the Contract Clause. As this Court explained in *Spannaus*, "[i]f the Contract Clause is to retain any meaning at all * * * it must be understood to impose *some* limits upon the power of a State to abridge existing contractual relationships, even in the exercise of its otherwise legitimate police power." 438 U.S. at 242; see also *PBGC* v. *R.A. Gray & Co.*, 467 U.S. 717, 732-733 (1984) ("we have contrasted the limitations imposed on States by the Contract Clause with the less searching standards imposed on economic legislation by the Due Process Clauses"); *United States Trust Co.*, 431 U.S. at 22 (even "private contracts are not subject to unlimited modification under the police power"). Nothing in the state court's decision, which looked no further than the "legitimate state interest" (App., *infra*, at 17a), shows any sensitivity to this point.

Indeed, in many respects the 1987 amendment was the very type of legislation designed to benefit a discrete and narrow class that the Court has held to violate the Contract Clause. See *Spannaus*, 438 U.S. at 247; see also *Energy Reserves Group*, 459 U.S. at 412 (Court must ensure that the state is not simply "providing a benefit to special interests"). The 1987 statute did not constitute general legislation that only incidentally affected obligations under various types of private contracts. To the contrary, as Justice Griffin noted in dissent (App., *infra*, 50a), the statute was "deliberately designed to disrupt retroactively past transactions" between employers and employees. Nor was the 1987 amendment enacted to address any real emergency. To the contrary, it was the *1981 statute* that was passed to deal with a serious economic problem—employees were "double-dipping" to such an extent that they were driving employers from the State and creating an economic crisis. The 1987 statute perpetuated

this "double-dip."[7] Nor was there any suggestion that the 1987 amendment was necessary to avoid destitution. To the contrary, the beneficiaries of the legislature's largesse were already receiving a full array of social security and retirement benefits. By virtue of the 1981 law, the principle of coordination is the regime applicable to every Michigan employee receiving workers' compensation benefits in the future—with the exception of the special class favored by the 1987 amendment. In sum, the 1987 statute was "not enacted to deal with a situation remotely approaching the broad and desperate emergency economic conditions" in cases such as *Blaisdell*. See *Spannaus*, 438 U.S. at 249; *Cooper* v. *Wicomico County*, 398 A.2d 1237, 1241 (Md. 1979) ("simply to increase the amount of a previously finalized award of compensation to meet the employee's 'generalized need for funds' would appear to rest on a tenuous constitutional foundation").

3. *The Reasonableness of the Means.* The Michigan Supreme Court's final conclusion was that the means chosen by the legislature were reasonable because the 1987 "statute imposes no more retroactive liability than is necessary to" effectuate its goal. App., *infra*, 17a. Even a cursory examination of the 1987 amendment, however, reveals that it was not a reasonable way of dealing with any problem that may have faced employees whose benefit levels were not increased by the unrelated statutory changes that took effect at the beginning of 1982. In fact, the fit is so poor that it is doubtful that the 1987 amendment was designed to deal with this issue at all.

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[7] The lack of any legislative record tying the 1987 amendment to any pressing public need is reason itself to reject the Michigan Supreme Court's hypothetical assumption that the legislature may have been seeking to help those employees whose benefit rates were not increased in 1982. See *Spannaus*, 438 U.S. at 247 ("there is no showing in the record before us that this severe disruption of contractual expectations was necessary to meet an important general social problem").

The court below stated that the 1987 amendment was intended to eliminate coordination of benefits, retroactive to 1982, for employees "whose injury dates were before 1982 since these employees were not entitled to the overall increase of benefits provided for those injured after 1982." App., *infra*, 17a. Yet the 1987 statute helped only the least deserving subset of employees injured prior to 1982—those who were able to double-dip into workers' compensation and retirement benefits. Surely, if the legislature had intended to assist employees whose benefits were not increased in 1982, the 1987 statute would not have been so arbitrarily limited. Instead, it would have more broadly increased the benefit levels of *all* employees who were injured prior to 1982. In any event, contrary to the Michigan court's critical assumption, many of the retirees who benefited from the 1987 amendment had in fact received substantial, non-coordinated increases (ranging from 10.3% to 86.6%) in their workers' compensation benefits in 1982 under the supplemental compensation scheme that went into effect that year. See note 1, *supra*. If the goal had been to help only those employees who were not receiving increased benefits, then extension of the supplemental benefit program—not retroactive non-coordination—would have been the rational means of accomplishing that end.

Thus, the 1987 amendment was hardly a legislative reaction to a sudden and unanticipated social or economic problem, but was shaped entirely to reverse a policy decision that had been made in the 1981 statute, as authoritatively interpreted by the state supreme court. The 1987 legislature was entitled to have a change of heart about whether coordination of benefits should be allowed for employees injured prior to 1982. But when it had such a change of heart, it had a constitutional duty to "make it prospective, but not retroactive." *Douglass* v. *County of Pike*, 101 U.S. 677, 687 (1880).

C. The Court's Balancing Test For Impairments Of Private Contracts is Unfaithful To The Language And Purpose Of The Contract Clause.

Although the Michigan Supreme Court's ruling should be reversed under this Court's precedents construing the Contract Clause, the amorphous balancing approach evidenced by the decision below unfortunately finds some support in this Court's decisions in recent years. Given the Court's increasing concern about fidelity to the language, history, and purpose of constitutional provisions, this is an appropriate occasion to reconsider the direction that the Contract Clause cases have taken and to restore the Clause to its proper place in the constitutional scheme.

During the first 150 years of the Nation's history, the Contract Clause, consistent with its unequivocal language and the intent of the Framers, was construed as a virtually absolute bar on retroactive impairments of contractual obligations. See, *e.g.*, *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810); *Dartmouth College* v. *Woodward*, 17 U.S. (4 Wheat.) 518 (1819); *Bank of Minden* v. *Clement*, 256 U.S. 126 (1921). Indeed, as this Court has noted, during the first century of our Constitution the Contract Clause was "perhaps the strongest single constitutional check on state legislation." *Spannaus*, 438 U.S. at 241. There is an extraordinary amount of evidence that confirms the message of the Contract Clause's plain and absolute text and demonstrates how central a role the Framers envisioned for this provision.[8]

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[8] See, *e.g.*, *Federalist* No. 44 (Madison), at 282 ("Bills of attainder, *ex post facto* laws, and laws impairing the obligation of contracts, are contrary to the first principles of the social compact and to every principle of sound legislation"); J. Story, *Commentaries on the Constitution of the United States* 505 (R. Rotunda & J. Nowak eds. 1987) ("The great object of the framers of the constitution undoubtedly was, to secure the inviolability of contracts. * * * The prohibition was universal"). See generally B. Wright, *The Contract Clause of the Constitution* 3-27 (1938); McConnell, *Contract*

(Footnote continued on following page)

The Court modified this approach in *Home Building & Loan Ass'n* v. *Blaisdell*, *supra*, in which, by a 5-4 vote, it upheld an emergency moratorium on mortgage foreclosures in response to the post-depression crisis facing the State of Minnesota. But *Blaisdell* itself was a limited departure: the Court repeatedly stressed the emergency nature of the provision and treated the case as one requiring it to "consider the relation of emergency to constitutional power." 290 U.S. at 425.

Notwithstanding the limited nature of *Blaisdell*, the Court proceeded over the subsequent few decades to expand the exception to the Contract Clause. See, *e.g.*, *Veix* v. *Sixth Ward Bldg. & Loan Ass'n*, 310 U.S. 32 (1940); *Keystone Bituminous Coal Ass'n* v. *DeBenedictis*, 480 U.S. 470, 505 (1987). See generally *City of El Paso* v. *Simmons*, 379 U.S. 497, 517 (1965) (Black, J., dissenting) (the Court has "balance[ed] away the plain guarantee of Art. I, § 10, that 'No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . .' "); *Chicago Bd. of Realtors* v. *City of Chicago*, 819 F.2d 732, 743-744 (7th Cir. 1987) (Posner and Easterbrook, JJ., concurring) (after *Blaisdell*, the Court "so fictionalized the concept of an 'emergency' that by 1978 the Court found it necessary [in *Spannaus*] to remind bench and bar that the contract clause was 'not a dead letter' "). Describing the Court's trend toward upholding impairments of contracts that satisfy the "reasonableness" standard, one pair of commentators has explained:

> The Framers * * * knew how to phrase prohibitions in terms of reasonableness, as shown by the Fourth Amendment's prohibition against "unreasonable searches and seizures." The Contract Clause is phrased in absolute terms and is grouped with other absolute prohibitions such as the Bill of Attainder and Ex Post Facto Clauses designed to protect the rule of law. Therefore, a contract clause jurisprudence that adheres to the original understanding must either strike down all retrospective impairments or, like first amendment jurisprudence, create an exceedingly stringent standard of review that only the most compelling demonstrations of necessity will satisfy.

Kmiec & McGinnis, *The Contract Clause: A Return to the Original Understanding*, 14 Hast. Const. L. Q. 525, 544 (1987). As Judge Posner has written: "Imagine what freedom of speech would have come to mean if the Court had interpreted the First Amendment—which is no more absolute in its language or clearcut in its history than the contract clause—as loosely as it now interprets the contract clause." *Chicago Bd. of Realtors*, 819 F.2d at 744.

The Court should return the Contract Clause to its constitutional moorings. To begin with, the Court should reconsider the dichotomy it has created between the scrutiny afforded public and private contracts (see *United States Trust Co.*, 431 U.S. at 22-23), because the historical record conclusively shows that "it is interference with *private* contracts that lies at the heart of the clause." McConnell, 76 Cal. L. Rev. at 294 (emphasis added). Furthermore, for both public and private agreements, a state should not be "completely free to consider impairing the obligations of * * * contracts on a par with other policy alternatives." *United States Trust Co.*, 431 U.S. at 30-31. Rather, in light of the language and history of the Contract Clause, any impairment must be justified by a compelling state interest or, at a minimum, by a showing that it was "essential to the achievement of an important state purpose." *Id.* at 32 (Burger, C.J., concurring). The contractual impairment here—involving the unprecedented retroactive reopening of obligations years after they had been paid in full, and years after the time for challenging them had expired—could not possibly withstand that scrutiny.

[8] *continued*
Rights and Property Rights: A Case Study in the Relationship Between Individual Liberties and Constitutional Structure, 76 Cal. L. Rev. 267 (1988).

II. THE DUE PROCESS CLAUSE PLACES SIGNIFICANT LIMITATIONS ON A STATE'S AUTHORITY TO ENACT RETROACTIVE LAWS THAT UPSET PARTIES' SETTLED EXPECTATIONS.

In holding that the 1987 amendment satisfied the requirements of the Due Process Clause, the Michigan Supreme Court purported to rely on past decisions of this Court. In fact, however, the court failed to give effect to this Court's repeated admonition that the Due Process Clause is particularly concerned with retroactive enactments that disturb past transactions and reasonable expectations. Based only on the most minimal scrutiny, the Michigan court upheld an enactment that, as Justice Griffin noted in dissent, was "deliberately designed to disrupt retroactively past transactions completed in reliance upon" a state statute as authoritatively construed by a state supreme court. App., *infra*, 50a. *No* decision of this Court (or, to our knowledge, of any other court) has ever held that a state may impose *five years* of retroactive monetary liabilities on parties that have so justifiably relied on prior law.

The Michigan court's approach might well be attributed to the dearth of practical guidance found in this Court's prior cases. Although this Court's decisions have emphasized that something more than mere rationality is required to sustain retroactive legislation, the Court has not adequately defined what additional justification is required or how courts should carry out the necessary inquiry. In view of what Justice Brickley referred to as "the lamentable failure of the United States Supreme Court to articulate any discernible limits on the constitutionality of retroactive civil, economic legislation" (App., *infra*, 22a (Brickley, J., concurring)), this Court should grant review and clarify the ambiguities in its due process jurisprudence.

A. A Mere Finding Of A Rational Legislative Purpose Is Insufficient To Justify A Purely Retroactive Enactment That Interferes With Settled Expectations.

The Michigan Court premised its due process holding on two decisions of this Court: *PBGC* v. *Gray*, *supra*, and *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976). Those decisions stand for the proposition that legislation imposing *prospective* liability for past acts may be consistent with due process. See also *United States* v. *Sperry Corp.*, 110 S. Ct. 387, 396 (1989). At the same time, however, the cases stress that the Due Process Clause demands special justification for retroactive modifications of past transactions. See *Gray*, 467 U.S. at 733; *Turner Elkhorn*, 428 U.S. at 17.

Moreover, both *Gray* and *Turner Elkhorn* specifically left open the continuing vitality of *Railroad Retirement Board* v. *Alton R. Co.*, 295 U.S. 330 (1935), which invalidated retroactive legislation requiring employers to finance pensions for former railroad employees who, while not employed by a railroad at the time of the statute's enactment, had been so employed during the prior year. See *id.* at 345, 349; *id.* at 389 (Hughes, C.J., dissenting) (agreeing with the Court that this portion of the legislation was unconstitutional). The Court in *Turner Elkhorn* distinguished *Alton* on the ground that, unlike the discredited railroad pension legislation, "[t]he point of the black lung benefit provisions is not simply to increase or supplement a former employee's salary to meet his generalized need for funds. Rather, the purpose of the Act is to satisfy a specific need created by the dangerous conditions under which the former employee labored." 428 U.S. at 19. See also *Gray*, 467 U.S. at 733.

Alton is squarely on point here. The 1987 amendment was not a response to "a specific need created by the dangerous conditions under which the former employee labored." The most that the Michigan Supreme Court

could say was that the law was designed simply as a substitute for a general cost of living increase in benefit levels. App., *infra*, 9a. And by its terms, the amendment does nothing more than ensure that retirees receive full pension *and* full workers' compensation benefits—in effect, as in *Alton*, "increas[ing] or supplement[ing] a former employee's salary to meet his generalized need for funds."

The Michigan Court seemed to believe that *Turner Elkhorn* and *Gray* dispensed with the need for careful analysis of the 1987 statute's constitutionality. That approach is attributable in part to this Court's failure to articulate specific criteria for reviewing due process attacks on retroactive enactments. On the one hand, the Court has repeatedly stressed that the "retrospective aspects of legislation, as well as the prospective aspects, must meet the test of due process, and the justifications for the latter may not suffice for the former." *Turner Elkhorn*, 428 U.S. at 17. Consistent with this formulation, the Court has declared that "the justification for the retrospective imposition of liability must take into account the possibilit[y] that * * * conduct may have been taken in reliance upon the current state of the law." *Ibid.* As Justice Scalia recently observed, the constitutionality of retroactive legislation "has been conditioned upon a rationality requirement beyond that applied to other legislation." *Bowen* v. *Georgetown Univ. Hosp.*, 488 U.S. 204, 223 (1988) (Scalia, J., concurring). And again last Term, in *McKesson Corp.* v. *Division of Alcoholic Beverages & Tobacco*, 110 S. Ct. 2228, 2252 n.23 (1990), the Court suggested that some retroactive increases in taxation could violate "due process by unduly interfering with settled expectations."

On the other hand, some of the language contained in *Gray* can be read to eschew consideration of reliance or other equitable factors. The Court stated at one point that the burden of justification for retroactive legislation could be "met simply by showing that the retroactive application of the legislation is itself justified by a rational legislative purpose." 467 U.S. at 730. Needless to say, however, a legislature may have a "rational" purpose for enacting a retroactive law notwithstanding the existence of demonstrable reliance interests in existing law.

This vagueness and confusion has left the lower courts without meaningful guidance. At least one state supreme court, for example, noting the tension between *Gray* and *Turner Elkhorn*, has adopted an explicit balancing test, explaining that "[a]gainst the unfairness of retroactivity in this case, we must balance the public interest it serves." *Lawrence* v. *Anheuser-Busch, Inc.*, 523 A.2d 864, 871 (R.I. 1987). As a result, while the Rhode Island Supreme Court posited that the legislation at issue in *Lawrence* had a rational cost-spreading purpose "similar to that [of the law at issue] in *Turner Elkhorn*," the court nevertheless invalidated the statute on due process grounds because the reliance of affected parties "on the preexisting law * * * outweigh[ed] the public interest served by the retroactive application of the [new law]." *Ibid.* Other courts, by contrast, have upheld retroactive legislation against due process attack without inquiring into reliance interests. See, *e.g.*, *United States* v. *Monsanto Co.*, 858 F.2d 160, 174 (4th Cir. 1988).

Uncertainty about the proper approach in this area has led some courts to substitute labels for analysis—a development that, not surprisingly, has led to conflicting outcomes in essentially identical cases. Thus, the Michigan Supreme Court reasoned that the 1987 amendment satisfied due process because "the defendants have no vested rights in the finality of the coordinated benefits paid." App., *infra*, 13a. As a leading commentator has observed, however, "it has long been recognized that the term 'vested right' is conclusory—a right is vested when it has been so far perfected that it cannot be taken away by statute." Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 Harv. L. Rev. 692, 696 (1960).

Indeed, in a case strikingly similar to this one, another state supreme court struck down a retroactive increase in workers' compensation benefits, finding that the existing benefit levels *were* "vested." *State ex rel. Briggs & Stratton Corp.* v. *Noll*, 302 N.W.2d 487, 490-492 (Wis. 1981). Such confusion about a recurring issue of considerable practical importance warrants this Court's consideration.

B. There Is A Temporal Point Beyond Which Retroactive Legislation Violates Due Process.

This Court recently recognized in *McKesson* that there are temporal limits to the permissibility of retroactive legislation:

> We previously have held that the retroactive assessment of a tax increase does not necessarily deny due process to those whose taxes are increased, *though beyond some temporal point the retroactive imposition of a significant tax burden may be "so harsh and oppressive as to transgress the constitutional limitation," depending on "the nature of the tax and the circumstances in which it is laid."*

110 S. Ct. at 2252 n.23 (emphasis added) (quoting *Welch* v. *Henry*, 305 U.S. 134, 147 (1938)). This limitation is directly relevant here. As the Michigan Supreme Court remarked, "[t]he payments at issue here are 'purely retroactive' in that they apply to payments for past injuries *and* they apply to payments that were already paid for past compensable periods." App., *infra*, 11a. In such circumstances, this Court has approved only legislation that reaches back to " 'recent transactions.' " *Welch*, 305 U.S. at 150 (citation omitted). Thus, in *Welch*, the Court affirmed the constitutionality of a retroactive tax increase by emphasizing that the state legislature had enacted the challenged law at "the first opportunity after the tax year in which the income was received." *Id.* at 151. See also *Gray*, 467 U.S. at 731 (stressing the "short and limited period" of retroactivity).

Against this background, a number of state supreme courts "have held unconstitutional any tax statute which attempts to be applied retroactively beyond the year of the legislative session immediately preceding the year of the statute's enactment." *Temple Univ.* v. *United States*, 769 F.2d 126, 134 (3d Cir. 1985). See *Commonwealth* v. *Budd Co.*, 108 A.2d 563, 568-569 (Pa. 1954); *Washington Nat'l Arena Limited Partnership* v. *Treasurer*, 410 A.2d 1060, 1064 & n.3 (Md. 1980). On the other hand, "no federal court of appeals has yet adopted an absolute temporal limitation on retroactivity." *Temple Univ.*, 769 F.2d at 135. The court below—which approved legislation altering *five years'* worth of past payments—plainly aligned itself with the latter decisions. Again, the question whether there are temporal limits on retroactive legislation is a recurring issue of substantial practical importance.

The Michigan Supreme Court's endorsement of open-ended retroactive liability also points up a final area of uncertainty—the validity of so-called "curative legislation." The Michigan legislature announced that the 1987 amendment was aimed at overruling an erroneous judicial decision and therefore was "curative" (1987 PA 28, section 354, subsection 17); the court below stated that its holding of constitutionality rested, in part, on the determination that "the Legislature was modifying the coordination of benefits provision to cure a perceived defect resulting from the interpretation of the prior law in *Chambers*." App., *infra*, 12a. But as Justice White (joined by Justice Blackmun) explained nearly a decade ago, this Court's decisions "appear to stand for the proposition that administrative, procedural, and technical defects unrelated to the underlying policy may be remedied by curative legislation, while legislative policy may not be changed retroactively." *Van Emmerik* v. *Janklow*, 454 U.S. 1131, 1133 (1982) (White, J., dissenting from dismissal of appeal). Justice White added that "the lower courts are in conflict, and

the Court's prior cases fail to furnish adequate guidance." *Id.* at 1133-1134. As the decision below makes clear, that confusion has not abated in the intervening years. See *New England Baptist Hosp.* v. *United States*, 807 F.2d 280, 284 (1st Cir. 1986). Because the Michigan Supreme Court's contrasting decisions in *Chambers* and in this case demonstrate that the 1987 amendment changed "legislative policy" on a sweeping retroactive basis, this is an appropriate case in which to resolve the scope of the "curative legislation" doctrine.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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MARCH 1991

APPENDICES

APPENDIX A

Evert ROMEIN, Plaintiff-Appellee,
and
Attorney General Frank J. Kelley, Intervenor-Appellee,
v.
GENERAL MOTORS CORPORATION, Defendant-Appellant.

Arthuro GONZALEZ, Plaintiff-Appellee,
and
Attorney General Frank J. Kelley, Intervenor-Appellee,
v.
FORD MOTOR COMPANY, Defendant-Appellant.

Docket Nos. 83830, 83831.
Calendar No. 7.

Argued Oct. 5, 1989.
Decided Sept. 28, 1990.

BEFORE THE ENTIRE BENCH
CAVANAGH, Justice.

We granted leave in these consolidated cases to decide the constitutionality of 1987 P.A. 28, § 354(17)-(20), M.C.L. § 418.354(17)-(20); M.S.A. § 17.237(354)(17)-(20). This statute prohibits the coordination of workers' compensation benefits for employees who were injured before the effective date of 1981 P.A. 203. It also requires the repayment plus interest of all benefits withheld as a result of coordinating benefits between 1982 and 1987 from disabled employees whose injury dates were before 1982. We hold that the amendments of the Workers' Disability Compensation Act contained in 1987 P.A. 28, § 354(17)-(20) are constitutional exercises of legislative power retroactively modifying benefit levels for a legitimate purpose furthered by rational means. We also hold that the statute does not abrogate any vested rights of the employers. The statute may validly be applied to all compensation liabilities within its terms except those which have been reduced to final judgment before its enactment.

FACTS AND PROCEDURAL HISTORY

The plaintiffs were injured before 1981. In 1981, the Legislature enacted 1981 P.A. 203 which included the coordination of benefits provision of § 354, M.C.L. § 418.354; M.S.A. § 17.237(354). This section allowed coordination of workers' compensation benefits with employer-funded pension plan payments. This statute was part of a legislative reform package involving a series of related amendments of the workers' compensation statute. The coordination provisions were an essential component of a compromise plan that restructured benefits payable to disabled workers. The resources saved as a result of this coordination were reallocated by the statute to increase benefit levels generally, from two-thirds of the average weekly wage to eighty percent of after-tax wages, effective for injuries occurring after January 1, 1982.

The plaintiffs were subjected to these coordination provisions even though the statute was silent regarding its application to claims resulting from injuries occurring before its 1982 effective date. On September 28, 1983, General Motors Corporation informed plaintiff Romein that he had been overpaid $75.03 per week from January 1, 1982, because of the corporation's failure to coordinate benefits under 1981 P.A. 203, § 354, as of its effective date. Thus, the corporation began to deduct the amount of this "overpayment" of $3,913.57 from compensation benefits as they became due and payable. The corporation also began coordinating future benefit payments by deducting pension and social security benefits from the workers' compensation payments due, resulting in a thirty-five percent reduction of benefits actually paid. This resulted in a reduction of $132 a week. His total benefits were reduced from $19,377.80 to $12,513.80 per year. Plaintiff Gonzalez experienced an even more dramatic reduction in his workers' compensation benefits. The Ford

Motor Company informed Gonzalez that it would begin coordination of his benefits in accordance with § 354 resulting in the withholding of his *entire* $176 weekly payment beginning March 31, 1982.

Between January 1, 1982, and October 7, 1985, the legality of coordination of benefits for injuries which occurred before the effective date of 1981 P.A. 203, § 354, was in doubt. The Legislature expressed its view that the initial, lower court decisions[1] permitting application of § 354 coordination rights only to claims arising from injuries occurring after the effective date of § 354 were correct.[2]

The defendants' efforts to coordinate plaintiffs' benefits under § 354 received judicial acceptance in 1985 when this Court reversed the lower court in *Chambers v. General Motors Corp.*, 422 Mich. 636, 375 N.W.2d 715 (1985). The Court applied principles of statutory interpretation to hold that § 354 permitted coordination of benefits regardless of the date of injury since the Legislature did not state an intent to apply the provision only to benefits paid to employees whose injuries occurred after its effective date.

Thereafter, the Legislature enacted 1987 P.A. 28 which clearly indicated that the coordination of benefits provision of 1981 P.A. 203 was not intended to reduce benefits for injuries which occurred before the effective date of the 1981 statute. This statute retroactively amended § 354

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[1] See *Chambers v. General Motors Corp.*, 1982 WCABO 751, and *Franks v. White Pine Copper Div.*, 122 Mich.App. 177, 332 N.W.2d 447 (1982).

[2] The House and Senate both adopted legislative resolution in early 1982, purporting to interpret § 354 to prevent the coordination of benefits of persons injured before the effective date of § 354. These legislative resolutions, however, are not binding on this Court. *Chambers v. General Motors*, 422 Mich. 636, 659, 375 N.W. 2d 715 (1985).

and prevented any coordination of benefits for claims arising from injuries which occurred before March 31, 1982.

The first provision of 1987 P.A. 28 states that it is the Legislature's intent to prohibit the coordination of benefits for pre-March 31, 1982, injuries.[3] Another provision of the act requires that any setoffs which have been made by employers between March 31, 1982, and May 14, 1987, be refunded to employees, with interest. Thus, any benefits that were reduced under the coordination provisions of § 354, are deemed by statute to have been "underpayments" of workers' compensation benefits and must be refunded within sixty days with interest.[4] In addition, if the employee had repaid money to the employer for benefits received that the employer alleged should have been coordinated, 1987 P.A. 28 requires the employer to reimburse the employee, with interest, within sixty days.[5]

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[3] Subsection 17 provides: "The decision of the Michigan Supreme Court in *Franks v. White Pine Copper Div.*, 422 Mich. 636, 375 N.W.2d 715 (1985), is declared to have been erroneously rendered insofar as it interprets this section, it having been and being the legislative intention not to coordinate payments under this section resulting from liability pursuant to § 351, 361, or 835 for personal injuries occurring before March 31, 1982. It is the purpose of this amendatory act to so affirm. This remedial and curative amendment shall be liberally construed to effectuate this purpose."

[4] Subsection 19 provides: "Notwithstanding any other section of this act, any payments made to an employee resulting from liability pursuant to § 351, 361, or 835 for a personal injury occurring before March 31, 1982 that have been coordinated before the effective date of this subsection shall be considered to be an underpayment of compensation benefits, and the amounts withheld pursuant to coordination shall be reimbursed with interest, within 60 days of the effective date of this subsection, to the employee by the employer or carrier."

[5] Subsection 20 provides: "Notwithstanding any other section of this act, any employee who has paid an employer or carrier money alleged by the employer or carrier to be owed the employer or

(Footnote continued on following page)

The issue before the Court is whether the Legislature has violated the defendants' constitutional rights under the Due Process or Contract Clauses of the state and federal constitutions by retroactively altering the level of benefits due and payable prior to the amendment. We must also decide whether this retroactive alteration of benefits violates the Separation of Powers and One Court of Justice Clauses of the Michigan Constitution.

I

The defendants contend that 1987 P.A. 28, § 354(17)-(20) violates the Due Process Clauses of the United States and Michigan Constitutions by retroactively imposing liability for additional workers' compensation benefits for past compensable periods. They contend that they relied on the coordination provisions of § 354 during the period between its effective date of March 31, 1982, and the amendment date of May 14, 1987, and that this reliance gives them a vested right to have their liability for those periods determined by the law then in effect.

The defendants argue that 1987 P.A. 28 is "purely retroactive" and unconstitutionally impairs rights under executed contracts of employment.

The defendants urge that this statute is "purely retroactive" because it not only applies to injuries arising before the effective date of the act, but also modifies the employer's liability for a preenactment compensable period.

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[5] *continued*
carrier because the employee's benefits had not been coordinated under this section and whose date of personal injury was before March 31, 1982, shall be reimbursed with interest, within 60 days of the effective date of this subsection, that money by the employer or carrier."

Thus, this statute is different from the one upheld in *Chambers*.

We hold that the challenged statute satisfies the rational relationship test and does not abrogate any vested rights of the employers. The statute, therefore, does not violate the Due Process Clauses.

A

A rational basis standard of review governs this Court's scrutiny of the legitimacy of social and economic legislation. "It is by now well established that legislative acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and that the burden is on one complaining of a Due Process violation to establish that the Legislature has acted in an arbitrary and irrational way. See, e.g., *Ferguson v. Skrupa*, 372 U.S. 726 [83 S.Ct. 1028, 10 L.Ed.2d 93] (1963); *Williamson v. Lee Optical [Co.,]* 348 U.S. 483, 487-488 [75 S.Ct. 461, 464, 99 L.Ed. 563] (1955)." *Pension Benefit Guaranty Corp. v. Gray*, 467 U.S. 717, 729, 104 S.Ct. 2709, 2717, 81 L.Ed.2d 601 (1984).

The rational basis test has been applied to the retroactive portions as well as to prospective portions of statutes modifying workers' compensation benefit levels. *Pension Benefit Guaranty Corp., supra.*

To apply a stricter standard of review to a workers' compensation statute simply because it operates *retroactively* would put the judiciary in the business of "allocat[ing] the interlocking economic rights and duties of employers and employees upon workmen's compensation principles" although this is a task within the province of the Legislature. *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15, 96 S.Ct. 2882, 2892, 49 L.Ed.2d 752 (1976),

citing *New York Central R. Co. v. White*, 243 U.S. 188, 37 S.Ct. 247, 61 L.Ed. 667 (1917).

B

A workers' compensation statute will not be deemed unconstitutional simply because it imposes "a new duty or liability based on past acts," *Usery, supra* 428 U.S. at 16, 96 S.Ct. at 2893. The *Usery* decision upheld the constitutionality of title IV of the Federal Coal Mine Health and Safety Act of 1969[6] against a Due Process Clause challenge by applying only minimal judicial scrutiny to its retroactive provisions. The statute retroactively imposed liability on employers for injuries which occurred years before its enactment. The law was retroactive in two respects. First, it altered the legal status of completed transactions by requiring the compensation of employees who left the industry before the effective date of the act. Second, it imposed liability on coal mine owners for injuries suffered before the date of the new statute.

The Court in *Usery, supra* at 16-17, 96 S.Ct. at 2893, cautioned that: "It does not follow, however, that what Congress can legislate prospectively it can legislate retrospectively. The retrospective aspects of legislation, as well as the prospective aspects, must meet the test of due process, and the justifications for the latter may not suffice for the former." The justification for retrospective legislation must take into account the possibilities that the parties acted in reliance on current law and that they may have altered their conduct to reduce liability if they had anticipated the imposition of later liability.[7] The coal mine

[6] See 30 U.S.C. §§ 931-945.

[7] The Court has examined an argument based on the likelihood of altering conduct to avoid future liability in *Welch v. Henry*, 305 U.S.

(Footnote continued on following page)

operators could not have altered their conduct to avoid retroactive liabilities arising from injuries occurring before 1950 because at that time there was no understanding of the causal relation between the exposure to coal dust and black lung disease. Thus, the injuries arising before the enactment of the statute could not have been foreseen or avoided.[8]

It is similarly unlikely that the defendants in this case would have altered their course of conduct and paid full benefits merely to avoid the potential liability from a later change in the law. This is especially true since they would have been unlikely to recoup these amounts from the employees if the coordination provisions were later upheld for pre-1982 injuries.[9] The employers acted in their own best economic interests at the time.

As in *Usery*, where the employer was required to pay benefits to former employees, the form of retroactive application at work here imposes liability for past, completed acts since the payments have already been made. These payments created an expectation in the employers that the payment periods were completed transactions. The employers in *Usery* also argued that the statute was pure-

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[7] *continued*
134, 59 S.Ct. 121, 83 L.Ed. 87 (1938). The Court upheld against due process attack a state statute enacted in 1935 which taxed 1933 dividend income previously exempted by the 1933 taxing statute. The Court held that the stockholder would have continued to receive corporate dividends even if he had known that the dividends would later be taxed.

[8] *Usery*, *supra* 428 U.S. at 40, n. 4, 96 S.Ct. at 2904, n. 4 (Powell, J., concurring).

[9] As Justice Boyle stated in *Chambers*, *supra* 422 Mich. at 662, 375 N.W.2d 715: "[O]verpayment by an employer while waiting for the board to approve a setoff may be difficult or impossible to recover."

ly retroactive in that it required payment to miners who left employment in the industry before the effective date of the act, i.e., past, completed transactions.

Admittedly, the employers in this case held an expectation that the payments were completed transactions. We do not accept, however, their contention that if parties have patterned their past conduct in reliance on past law, they have a vested right to have the legality of that conduct determined under law then in effect. The rational relationship test applies to economic legislation whether it is retroactive or not. The retroactive aspects of legislation must meet the test of due process, "[b]ut that burden is met by showing that the retroactive application of the legislation is itself justified by a rational legislative purpose." *Pension Benefit Guaranty Corp.*, *supra* 467 U.S. at 730, 104 S.Ct. at 2718. The Court in *Usery* held that the retroactive portion of the statute was justified "as a rational measure to spread the costs of the employees' disabilities to those who have profited from the fruits of their labor—the operators and the coal consumers." *Usery*, *supra* 428 U.S. at 18, 96 S.Ct. at 2893.

The retroactive portions of the statute challenged here are justified by a rational legislative purpose to protect the benefit levels of workers who did not receive the increases in the legislative reform packages of 1980 and 1981. Since they did not receive the increase, remedial measures were needed. These amendments served a rational legislative purpose to alleviate this hardship.

The United States Supreme Court has upheld retroactive liability even where the employers acted in reliance on existing law. In *Pension Benefit Guaranty Corp.*, *supra* 467 U.S. at 729, 104 S.Ct. at 2717, the Court upheld the retroactive application of the Multiemployer Pension Plan

Amendments Act of 1980.[10] The statute modified the terms of a governmentally provided program of insurance designed to insure that the termination of a pension plan would not result in insufficient funds to pay employees their anticipated benefits. Employers paid premiums for the benefit of this government subsidized insurance program. The act imposed a new obligation on employers who terminated their plans to pay a proportionate share of the plan's "unfunded vested benefits." This new withdrawal liability was made retroactive for five months preceding the enactment of the amendments.[11]

The United States Court of Appeals for the Ninth Circuit found that the retroactive provisions of the act violated due process rights[12] because the employers had legitimately relied on existing law upon withdrawing from pension plans, but the United States Supreme Court reversed. The Court concluded that Congress could impose the act retroactively because the retroactive portion was a rational means to further a legitimate end, namely, "to prevent employers from avoiding the adverse consequences of [the newly enacted] withdrawal liability. . . ." *Id.* at 723, 104 S.Ct. at 2715.

The defendants seek to distinguish *Usery* and *Pension Benefit Guaranty Corp.* by arguing that the retroactive provisions of 1987 P.A. 28 are materially different from the workers' compensation and pension liabilities imposed

[10] 29 U.S.C. §§ 1381-1461.

[11] The retroactive provisions of the act resulted in the appellee in *Gray, supra,* having to pay a withdrawal liability of $201,359 that could neither have been foreseen nor avoided. *Id.* 467 U.S. at 725, 104 S.Ct. at 2715. Prior to enactment, this employer would have been liable upon termination of the plan to pay only funded pension rights that had vested.

[12] See *Shelter Framing Corp. v. Pension Benefit Guaranty Corp.*, 705 F.2d 1502 (C.A.9, 1983).

by the statutes addressed in those two cases. The defendants argue that the statute in *Usery* only prospectively mandated the payment of new compensation obligations and so did not impose new liabilities for past compensable periods as does 1987 P.A. 28. But as to those miners in *Usery* who had left employment in the industry before the effective date of the act, the liability for past, completed transactions was altered. Additionally, the form of retroactivity does not alter the relevant test for assessing a due process violation. The payments at issue here are "purely retroactive" in that they apply to payments for past injury and they apply to payments that were already paid for past compensable periods. We cannot say, however, that the form chosen by the Legislature was arbitrary or unreasonable.

To determine if the retroactivity is arbitrary or unreasonable, the party's reliance on the preexisting state of the law should be considered.[13] Thus, we must address the extent of the defendants' justifiable reliance on the coordination provisions of the prior statute repealed by 1987 P.A. 28.

We are not persuaded that the defendants' reliance on the coordination provisions was reasonable.

The defendants cannot claim a reliance interest on rights created by the workers' compensation statute that are more deserving of constitutional protection than the reliance interest of the employers who incurred retroactive liabilities under the pension law upheld in *Pension Benefit Guaranty Corp., supra* 467 U.S. at 727, 104 S.Ct. at 2716. In both instances, the employers were on notice of the

[13] See *Brennan v. Kirby*, 529 A.2d 633, 640 (R.I., 1987), citing Hochman, *The Supreme Court and the constitutionality of retroactive legislation*, 73 Harv.L.R. 692, 727 (1960).

legislative debate regarding the proposed changes in the law. Reliance on an area of law that is in a state of flux is not reasonable reliance.

There are no vested rights in the amount of liability established at the time of an injury. The Legislature possesses the authority to enact workers' compensation laws that " 'increase the burden on the employer for disability or expenses occurring or continuing after the date of enactment of the amendatory statute, even though the accident which gave rise to the disability or expenses had occurred prior to that time.' " *Lahti v. Fosterling*, 357 Mich. 578, 592, 99 N.W.2d 490 (1959), citing *Hogan v. Lawlor & Cavanaugh Co.*, 286 A.D. 600, 146 N.Y.S.2d 119 (1955).[14]

This Court has held that a remedial statute which acts retroactively does not violate due process so long as it does not impair vested rights.[15] The statute challenged here does not violate this principle for several reasons. First, from the context in which the statute was passed, it is clear that the Legislature was modifying the coordination of benefits provision to cure a perceived defect resulting from the interpretation of the prior law in *Chambers*, *supra*. Therefore, the amendment is remedial.

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[14] We do not address in this opinion the constitutionality of a retroactive statutory *reduction* in workers' compensation benefit levels.

[15] In *Karl v. Bryant Air Conditioning Co.*, 416 Mich. 558, 331 N.W.2d 456 (1982), the Court held that the newly enacted statute adopting comparative negligence could be applied to a products liability action even though the action was brought before the adoption of comparative negligence; the retroactivity did not violate due process because it did not take away any vested rights. See also *Hansen-Snyder Co. v. General Motors Corp.*, 371 Mich. 480, 124 N.W.2d 286 (1963).

Second, the defendants have no vested rights in the finality of the coordinated benefits paid. The retroactive liability imposed by 1987 P.A. 28 does not abrogate a vested or contractual right of the employers since workers' compensation benefits and liabilities are statutory in origin and may be revoked or modified at the will of the Legislature. See *Lahti*, *supra* 357 Mich. at 589, 99 N.W.2d 490. The United States Supreme Court has held that an employer's interest in the rate of compensation is not a right that is absolutely vested for purposes of the Due Process Clause: "[Certain] vested economic rights are held subject to the Government's substantial power to regulate for the public good the conditions under which business is carried out and to redistribute the benefits and burdens of economic life."[16]

Finally, the 1987 amendment only modifies the source of funds from which an employer may satisfy a workers' compensation award. The entitlement to benefits was established before the enactment of the original coordination of benefits statute. The amendment does not create a new entitlement conferring a disability status not provided under prior law. In *White v. General Motors Corp.*, 431 Mich. 387, 395-396, n. 7, 429 N.W.2d 576 (1988), this Court recognized that the retroactive increase of the amount of benefits owing to a disabled employee differs qualitatively from a statute altering the terms of a claimant's eligibility for benefits. Thus, the defendant's assertion that the *amount* of benefits specified by statute is a vested right and cannot be retroactively modified is unsupported by case law.

We hold, therefore, that 1987 P.A. 28 is constitutional even though it applies to benefits due and payable for

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[16] *United States v. Locke*, 471 U.S. 84, 105, 105 S.Ct. 1785, 1798, 85 L.Ed.2d 64 (1985), citing, *inter alia*, *Usery*, *supra*.

a period before the effective date of the statute. We hold further that only judgments entered under former law are immune from this legislative modification. This limitation protects the vested rights that form in reliance on an award at the moment it is reduced to a final judgment.

II

Having found no violation of the Due Process Clauses, we must now decide if 1987 P.A. 28 violates the Contract Clause, U.S. Const., art. I, § 10. The defendants contend that the retroactive provisions violate the Contract Clause because they revive liabilities of employers that were fully discharged by completed transactions in reliance on state law. We hold that the contention lacks merit primarily because the expectation at issue here is not protected by the Contract Clause.

Further, even if the benefit levels were construed as a contractual right, the law serves a significant and legitimate public purpose and it employs reasonable means sufficient to survive a Contract Clause challenge.

A

The defendants cannot rely on the level of benefits existing at the time of an injury as a legitimate contractual expectation protected by the Contract Clause. *Lahti, supra* 357 Mich. at 590-592, 99 N.W.2d 490.

Additionally, in *Chambers*, this Court reiterated the established principle that benefits and liabilities in the workers' compensation statute do not create rights protected by the Contract Clause. *Chambers, supra* 422 Mich. at 654, 375 N.W.2d 715, citing *Shavers v. Attorney General*, 402 Mich. 554, 267 N.W.2d 72 (1978), and *Lahti, supra* 357 Mich. at 591-592, 99 N.W.2d 490.

B

Even though we hold that the Contract Clause does not apply to the benefits at issue here, the retroactive provisions would survive a Contract Clause challenge. While the Contract Clause prohibits any state law from impairing the obligations of contract, this prohibition must be "accommodated to the inherent police power of the State 'to safeguard the vital interest of its people.' " *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 410, 103 S.Ct. 697, 704, 74 L.Ed.2d 569 (1983). The prohibition, therefore, is not absolute. To test for the valid accommodation of the Contract Clause and the state's police power, the United States Supreme Court has established a three-pronged test. The first prong is to determine "whether the state law has, in fact, operated as a substantial impairment of a contractual relationship." *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 244, 98 S.Ct. 2716, 2722, 57 L.Ed.2d 727 (1978).

The impairment in this case cannot be deemed a substantial one. The workers' compensation statute substitutes a remedial scheme of compensation for injuries otherwise subject to recovery in tort actions for the negligent acts of employers in the workplace. The employers benefit from this scheme by obtaining a definite limit on their liability for workplace injuries. Since the impairment complained of in this case does not alter this basic benefit to the employer, it cannot be said to be substantial.

One factor in determining the extent of the impairment is the degree of regulation in the industry the complaining party has entered.[17] The party to a contract who has

[17] *Energy Reserves Group, Inc., supra*, citing *Spannaus, supra* 438 U.S. at 242, n. 13, 98 S.Ct. at 2721, n. 13, citing *Veix v. Sixth Ward Bldg. & Loan Ass'n*, 310 U.S. 32, 38, 60 S.Ct. 792, 794, 84

(Footnote continued on following page)

entered into a highly regulated industry may not remove their contract from state restrictions merely by making a contract purportedly immune from legal limitation. *Energy Reserves Group Inc., supra* 459 U.S. at 411, 103 S.Ct. at 704, citing *Hudson Co. Water Co. v. McCarter*, 209 U.S. 349, 357, 28 S.Ct. 529, 531, 52 L.Ed. 828 (1908). The workers' compensation statute regulates a field of commerce that has been subject to a wide-ranging and comprehensive scheme of government regulation. In this scheme the parties occupy a status that subjects them to certain retroactively imposed rights and liabilities. *Lahti*. The defendants knew that their rights were subject to alteration. In addition, the legislative resolution in early 1982 purporting to interpret § 354 put the defendants on notice that the Legislature might seek to prevent the coordination of benefits for pre-1982 injuries if efforts to achieve this result failed in the courts. Since the employer was aware of the likely alteration of the coordination of benefits provision, the impairment cannot be deemed substantial.

To the extent, if any, that contractual interests are impaired, the second prong of the Contract Clause test requires that there be a legitimate public purpose for the regulation. This requirement guarantees that rather than merely providing a benefit to special interests, the state is validly exercising its police power. There is a significant state interest in protecting the right of disabled employees to receive the full compensation intended by the Legislature in return for the relinquishment of their tort claim.

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[17] *continued*
L.Ed. 1061 (1940) ("When he purchased into an enterprise already regulated in the particular to which he now objects, he purchased subject to further legislation on the same topic").

It is significant that in the 1981 amendment, the resources saved as a result of coordination of benefits were reallocated to increase benefit levels generally. These increased levels, however, were only for injuries after January 1, 1982. The Legislature could have reasonably found that the coordination of benefits caused hardship among the employees whose injury dates were before 1982 since these employees were not entitled to the overall increase of benefits provided for those injured after 1982. There was a legitimate state interest, therefore, in correcting this perceived inequity.

The final prong of the Contract Clause test examines the means by which the contracting parties' rights and responsibilities are adjusted. The means chosen here are reasonable in the light of deference given to legislative action. "As is customary in reviewing economic and social regulation . . . courts properly defer to legislative judgment as to the necessity and reasonableness of a particular measure." *United States Trust Co. v. New Jersey*, 431 U.S. 1, 22-23, 97 S.Ct. 1505, 1518, 52 L.Ed.2d 92 (1977). The means are also reasonable since the statute imposes no more retroactive liability than is necessary to remedy an unexpected circumstance relating to the interpretation of a prior statute. The judicial interpretation that allowed for the setoff was deemed to be incorrect and the setoff must be returned, not an unreasonable solution.

We find that 1987 P.A. 28 serves a legitimate state interest in protecting the benefits of disabled employees through reasonable means sufficient to survive a Contract Clause challenge.

III

Turning to the Separation of Powers and One Court of Justice argument, we do not read the provisions of 1987

P.A. 28, § 354(17)-(20), as violating either art. 3, § 2 or art. 6, § 1 of the Michigan Constitution. The operative provisions of the statute do not encroach upon the sphere of the judiciary. Rather, they merely repeal the act that *Chambers* construed. That prior statute is superseded by 1987 P.A. 28 and the amendatory act expressly indicates that it is to be applied retroactively. This enactment is a valid exercise of the Legislature's authority to retroactively amend legislation perceived to have been misconstrued by the judiciary. Such retroactive amendments based on prior judicial decisions are constitutional if the statute comports with the requirements of the Contract and Due Process Clauses of the federal and state constitutions, and so long as the retroactive provisions of the statute do not impair final judgments.

Numerous courts have recognized that the Legislature may cure the judicial misinterpretation of a statute. For instance, the federal courts have upheld statutes that retroactively abrogate statutory rights, at least where the repealing statute does not impair final judgments.[18] In *Seese v. Bethlehem Steel Co.*, 168 F.2d 58, 61 (C.A. 4, 1948), the court reasoned that the Legislature's enactment of a retroactive statute repealing *the effects of a prior judicial decision* is not an exercise of judicial power:

"When the Fair Labor Standards Act was interpreted by the Supreme Court as requiring computation in the work week of time consumed in walking to work and other preliminary activities, this was just as though the original act contained express provision to that effect; and, when Congress passed the sections of the statute here under consideration, the effect was to repeal the original

[18] See, e.g., *Long Island Oil Products Co., Inc. v. Local 553 Pension Fund*, 775 F.2d 24, 30 (C.A.2, 1985).

statute to the extent of that coverage and deny to the federal courts jurisdiction to entertain a suit based thereon. This does not in any manner affect adjudications already made, nor does it attempt to direct the courts in the exercise of judicial power. All that it does is to define rights, i.e., to amend or limit the effect of a prior statute so as to take away a cause of action given by it."[19]

Similarly, in *Long v. United States Internal Revenue Service*, 742 F.2d 1173 (C.A. 9, 1984), subsequent proceedings vacated on other grounds 487 U.S. 1201, 108 S.Ct. 2839, 101 L.Ed.2d 878 (1988), the court upheld a statute that abolished the plaintiff's right to obtain disclosure of certain IRS data, although such disclosure rights had been created by a previous federal appellate decision interpreting a statutory exemption to the Freedom of Information Act. In upholding the Congressional repeal of this exemption against due process challenge, the Court articulated a principle that is useful in resolving the separation of power claim presented here: "Courts have consistently upheld the retroactive application of 'curative' legislation which corrects defects subsequently discovered in a statute and which restores what Congress had always believed the law to be." *Id.* at 1183.

Indeed, if the defendants' separation of powers claim had merit as applied to the curative statute challenged here, the power of the Legislature to enact curative and remedial legislation would be severely curtailed, even where the statute does not violate constitutional due process

[19] Accord *Battaglia v. General Motors Corp.*, 169 F.2d 254, 261-262 (C.A.2, 1948) ("[n]or is the Portal-to-Portal Act . . . an encroachment upon the separate powers of the judiciary").

limits.[20] This would represent a judicial usurpation of what is properly a legislative function.[21]

Finally, we conclude that § 354, as originally enacted in 1982, gave employers the right to coordinate benefits when an employee received a duplicate recovery through the receipt of other employer-funded benefits. Thus, employers may have properly exercised this right by withholding compensation benefits due and payable between the date of decision of *Chambers* in 1985 and the repeal of these provisions in 1987. An employer's act of withholding benefits, however, does not have the status of a final judgment.[22]

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[20] We are, however, troubled by the language of subsection 17 of 1987 P.A. 28. This provision contends that this Court's holding in *Franks*, n. 3 *supra*, was erroneous. Even though the Legislature has authority to remedy the *effects* of this Court's decisions, and may do so by repealing statutes which those decisions interpret, the Legislature lacks the power to act as a supreme judicial body. But we need not address the defendants' separation of powers claim with respect to this particular provision. Even if we held that subsection 17 violated the Separation of Powers Clause of the Michigan Constitution, this holding would not affect the validity of subsections (18)-(20). These separate amendatory provisions express a legislative intent to retroactively prohibit the coordination of benefits authorized by the prior statute. These provisions wholly replace the former law. The legal effect of such a repealing statute that wholly supplants a former statute was addressed by this Court in *Lahti*, *supra* 357 Mich. at 588, 99 N.W.2d 490. *Lahti* held:

"Where a section of a statute is amended, the original ceases to exist, and the section as amended supersedes it and becomes a part of the statute for all intents and purposes as if the amendments had always been there." *Id.*

[21] See, generally, Hochman, n. 13 *supra* at 704.

[22] We do not address the question of how and to what extent the principles of finality are implicated.

CONCLUSION

The employers' right to coordinate benefits as provided by statute in 1982 was repealed by 1987 P.A. 28 through a constitutional exercise of legislative authority to regulate social and economic life. We hold that 1987 P.A. 28 does not violate the Due Process Clauses of the state and federal constitutions, the Contract Clause of the federal constitution, or the Separation of Powers Clause of the Michigan Constitution, so long as it is not applied to impair coordination rights that were reduced to final judgment before its effective date.

Accordingly, we affirm the decision of the Court of Appeals.

LEVIN, BOYLE and ARCHER, JJ., concur.

BRICKLEY, Justice (concurring).

I. Introduction

Troubled though I am by the 1987 amendments at issue here, reaching back as they do to rewrite the past by altering the past consequences of past transactions, the lamentable failure of the United States Supreme Court to articulate any discernible limits on the constitutionality of retroactive civil, economic legislation forecloses the conclusion that the 1987 amendments violate the Due Process Clause of the Fourteenth Amendment. For this reason, I reluctantly concur with the majority.

The threat that retroactive legislation poses to our system of republican government should, in my judgment, be taken very seriously. The alarm has been sounded by Professor Julian N. Eule, in his recent article *Temporal limits on the legislative mandate: Entrenchment and retroactivity*, 1987 Am. B. Found. Res. J. 379. I write separately primarily to amplify Professor Eule's message.

II. The Absence of Meaningful Constitutional Limitations on Retroactive Civil Legislation

A

Regarding the current state of the law, Professor Eule neatly sums up the sad state of affairs as follows:

> "Efforts to locate limits on retroactivity in the due process clauses of the fifth and fourteenth amendments, although once viewed as promising, seem to have fallen on hard times. The resurrection of the contract clause has not been paralleled under the due process provisions. The occasional noises emanating from the Court, designed to remind us that the route is not foreclosed, have a hollow ring to them. In *Usery v. Turner Elkhorn Mining Co.* [428 U.S. 1, 96 S.Ct. 2882, 49 L.Ed.2d 752 (1976)], for example, Justice Marshall, writing for the Court, concluded his recitation of the minimal scrutiny appropriate in reviewing economic legislation under the due process clause with the statement: 'It does not follow, however, that what Congress can legislate prospectively it can legislate retrospectively.' In the context of the entire opinion, which nevertheless upheld the retrospective application of federal mine health legislation, this language cannot be fairly read as proposing or applying a more stringent level of scrutiny for retroactive legislation. Minimal scrutiny is still very much the order of the day. Only the focus is adjusted slightly. Hence it is not the legislative selection of the means but its decision to apply the means retrospectively that must bear a 'rational relationship' to whatever legitimate ends the Court conjures up. The slim possibility that a successful attack could ever be launched, given the size of this judicially constructed target, is rendered implausible by the strong presumption of constitutionality that economic and remedial social enactments are afforded, even when retroactive. In the determination of whether retrospective economic legislation violates due process, the burden of proving irrationality thus rests squarely on the party asserting the violation. There is not much for a legislator to worry about here." *Id.*, p. 429 (citations omitted).

B

In my opinion, *Turner Elkhorn* and *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 104 S.Ct. 2709, 81 L.Ed.2d 601 (1984), make clear that the legislation here under attack need only survive minimal, rational-basis scrutiny.[1] In addition, there are numerous

[1] The Contract Clause, as the majority observes, does not help the appellants, and potentially promising arguments based on the Taking Clause of the federal constitution and Const. 1963, art. 4, § 27 are not before us.

cases from the federal courts of appeals supporting the majority's result. See, e.g., *Wiggins v. Comm'r of Internal Revenue*, 904 F.2d 311 (C.A. 5, 1990) (upholding the retroactive application to tax year 1983 of 1984 federal tax legislation, despite the appellant's reliance on the prior law); *Canisius College v. United States*, 799 F.2d 18 (C.A. 2, 1986), cert. den. 481 U.S. 1014, 107 S.Ct. 1887, 95 L.Ed.2d 495 (1987), *Temple Univ. v. United States*, 769 F.2d 126 (C.A. 3, 1985), cert. den. 476 U.S. 1182, 106 S.Ct. 2914, 91 L.Ed.2d 544 (1986), and *New England Baptist Hosp. v. United States*, 807 F.2d 280 (C.A. 1, 1986) (upholding, against a due process challenge, a retroactivity period of approximately four years); *Long Island Oil Products v. Local 553 Pension Fund*, 775 F.2d 24 (C.A. 2, 1985) (upholding a statute which reached back five years to undo a previously authorized six-month period of retroactivity); *United States v. Northeastern Pharmaceutical & Chemical Co., Inc.*, 810 F.2d 726 (C.A. 8, 1986), cert. den. 484 U.S. 848, 108 S.Ct. 146, 98 L.Ed.2d 102 (1987), *United States v. Monsanto Co.*, 858 F.2d 160 (C.A. 4, 1988), cert. den. 490 U.S. 1106, 109 S.Ct. 3156, 104 L. Ed.2d 1019 (1989), and *O'Neil v. Picillo*, 883 F.2d 176 (C.A. 1, 1989), cert. den. 493 U.S. ____, 110 S.Ct. 1115, 107 L.Ed.2d 1022 (1990) (upholding retroactive application of a federal environmental statute creating liability for past, improper disposal of hazardous waste); *Counsel v. Dow*, 849 F.2d 731 (C.A. 2, 1988), cert. den. 488 U.S. 955, 109 S.Ct. 391, 102 L.Ed.2d 380 (1988) (upholding legislation retroactively authorizing attorney fees); and cases upholding the constitutionality of the Portal-to-Portal Act of 1947, 29 U.S.C. § 251 *et seq.*, including *Battaglia v. General Motors Corp.*, 169 F.2d 254 (C.A. 2, 1948), cert. den. 335 U.S. 887, 69 S.Ct. 236, 93 L.Ed. 425 (1948), and *Seese v. Bethlehem Steel Co.*, 168 F.2d 58 (C.A. 4, 1948) (upholding extensive retroactive nullification of a Supreme

Court decision interpreting the Fair Labor Standards Act of 1938, 29 U.S.C. § 201 et seq.).

III. Temporal Limits on the Legislative Mandate

While Professor Eule's insights cannot be faithfully reproduced in a short space, the following excerpts may suffice to convey the gist of his thesis.

> "The Framers were not blind to the citizenry's need for some security from the 'fluctuating policy' of successive legislatures. It was to fulfill this need, said Madison, that the contract and ex post facto clauses were written into the Constitution. Conflicting lessons can be drawn from the inclusion of these restraints. They may alternatively be viewed as limited sanctuaries from the otherwise unfettered authority of legislatures to undo the policy judgments of their predecessors or as compelling evidence of the disfavored status of retrospective lawmaking. It is the choice between these competing visions—rather than the debate over natural law—that ultimately divided Justices Iredell and Chase in *Calder v. Bull* [3 U.S. (3 Dall) 386; 1 L. Ed. 648 (1798)]. Both agreed that the ex post facto clause could not, consistent with the historical meaning of that phrase, be applied to the civil legislation before the Court. For Justice Iredell this ended the constitutional inquiry since he believed that the legislature's power necessarily included all that was not expressly denied to it. Furthermore, in Iredell's eyes, the power to alter preexisting legal understandings was essential, not merely tolerable. He argued that if legislators were denied the ability to subordinate private rights to public exigencies, 'the operations of Government would often be obstructed, and society itself would be endangered.' Iredell was not blind to the possibilities for abuse, but he contended that such risks had been undertaken willingly by the people when they delegated authority to their agents.

"Justice Chase viewed the people's grant as more restrained. Rejecting Iredell's assumption that power not denied was conferred, Chase maintained instead that power not conferred was denied. A determination of what authority the people had entrusted to their agents (through the federal or state constitution) could not be made without an understanding of the principles of a republican form of government. Legislation inconsistent with those principles should be viewed as beyond the scope of the grant. The inapplicability of the ex post facto clause did not foreclose the possibility that the power exercised by the Connecticut legislature was one that the people of Connecticut had not conferred. It is common for scholars to characterize Justice Chase's vision as limiting legislative power by reliance on immutable natural rights. This misses the point. Chase's thesis was not that government *could not* be given the authority to act retrospectively, but that the conferral of power to act at odds with republican principles should not be 'presumed.' For both Justices, therefore, the issue was one of agency: Does the scope of authority delegated by the people to their representatives comprehend the power to legislate retroactively where the exercise of such power is not expressly forbidden?

* * *

"The voters do not delegate authority to rewrite history. Their earlier agents exercised legitimate authority when they enacted legislation. While such efforts may be repealed, this is not the same as retrospective eradication. A decision that bills defeated by prior legislatures can now be enacted and treated as if they had been enacted earlier arguably runs afoul of this same principle. The then-authorized representatives made a choice, and this decision demands recognition as the choice of the polity for that point in time. Each set of elected officials ought to be viewed as endowed by their sovereign with the mandate to make policy choices only within a bracketed temporal zone. Just as the delegation of authority does not encompass incursions into the domain of legislatures yet to come, it does not contemplate contravening the sanctity of the past.

"While I contend that the prohibition against entrenchment and retroactivity are both products of the temporal boundaries the electorate affixes to its mandate, I do not pretend that these two borders are drawn to serve identical ends. I do believe they manifest a common interest in affording each generation of voters the opportunity to determine for itself, through its representatives, the rules that will govern its daily life. The two constraints, however, satisfy different—and at times conflicting—human needs. The postmandate restriction protects flexibility. It preserves the polity's right to change its mind. The premandate limitation, on the other hand, offers stability. It enables the polity to alter its direction, without unduly undermining the security we all find so necessary. This means that the choices of our representatives can be relied on for the temporal realm in which these agents legitimately exercised authority. No more is guaranteed, but no less is tolerable." Eule, *supra*, pp. 441-446 (emphasis in original).

The Legislature in this case did not merely change the future consequences of past acts, i.e., by changing the future benefit levels for persons injured prior to 1982—a practice which the appellants concede would be a constitutional way to amend our workers' compensation scheme; rather, the Legislature turns back the clock to redefine rights and liabilities enjoyed and owing in the past, notwithstanding the fact that those rights and liabilities had already been determined by an earlier and different body of agents of an earlier majority, determinations which the Legislature in 1983, 1984, 1985 and 1986 declined to change. The legislation in this case violates the temporal limits of the 1987 Legislature. Because the United States Supreme Court has given no indication that it approves of Professor Eule's approach, however, I must decline to dis-

sent on these grounds from the majority's finding that the 1987 amendments are constitutional.[2]

IV. Analysis of the Majority Opinion

For the most part, I concur with the analysis adopted in the majority opinion. I, too, am troubled by the Legislature's apparent attempt to interpret a prior statute adopted by a prior Legislature. This is doubly distressing in light of our intervening decision in *Franks v. White Pine Copper*, 422 Mich. 636, 375 N.W.2d 715 (1985). Because the Legislature may not interpret its own statute, let alone that of a prior Legislature, I agree with the majority that the 1987 legislation must be viewed as a retroactive amendment rather than as a "legislative interpretation" of an earlier statute. This is the effect of the 1987 legislation, and courts, which must presume statutes to be constitutional, are required to look beyond form to the substance of the challenged legislation.[3] As stated earlier, I find no principled basis for concluding that the 1987 amendments fail the rational basis tests articulated by the United States Supreme Court; since appellants have not offered a persuasive reason for giving a broader interpretation to the Due Process Clause of the state constitution, I agree that appellants' due process claims fail.[4]

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[2] While the appellants refer to Professor Eule's article, they do not mount a "temporal mandate" attack on the 1987 amendments rooted in the state constitution or in the Guaranty Clause of the federal constitution.

[3] Thus, if the provision declaring our decision in *Franks* erroneous is struck from the 1987 amendments, we must nevertheless determine whether the remainder may stand on its own terms. Since the remaining provisions clearly operate retroactively, the relevant inquiry is whether they offend due process.

[4] In addition, no reasons are offered why the traditional rational basis inquiry should not apply to the due process claim.

I also agree with the majority that the appellants cannot show any sort of reliance on the prior state of the law. I would not, however, go so far as to hold the possibility of reasonable reliance foreclosed by the mere fact that the Legislature debated changing the law before doing so.

I do not agree with the majority's cursory discussion and conclusion, Op. p. 564, that the amendments in this case are "remedial." That term, in my view, should be used with caution, lest every amendment be deemed remedial. The majority has not persuaded me that the amendments at issue in this case should be so categorized.

Finally, I would not analyze appellants' Contract Clause argument as if that clause applied in this case. I therefore concur in the analysis and holding of § II(A), but not in those of § II(B).

In all other respects, I concur in the result and analysis of the majority opinion.

RILEY, Chief Justice (dissenting).

I respectfully dissent from the majority. In my opinion, the Legislature has invaded the constitutional authority granted to the judicial branch and usurped the judicial function of determining the proper construction of a statute. It is within the power of this Court, not the Legislature, to interpret the legislative intent of 1981 P.A. 203. Therefore, I would conclude that 1987 P.A. 28, § 354(17)-(20), violates art. 3, § 2 and art. 6, § 1 of the Michigan Constitution of 1963. Accordingly, I would hold that 1987 P.A. 28, § 354(17)-(20) is to be applied prospectively from its effective date, May 14, 1987.

I. HISTORICAL BACKGROUND

In 1987 P.A. 28, § 354(17), the Legislature stated:

> "The decision of the Michigan Supreme Court in *Franks v. White Pine Copper Division*, 422 Mich. 636 [375 N.W.2d 715] (1985) is declared to have been erroneously rendered insofar as it interprets this section, it having been and being the legislative intention not to coordinate payments under this section resulting from liability pursuant to section 351, 361, or 835 for personal injuries occurring before March 31, 1982. It is the purpose of this amendatory act to so affirm. This remedial and curative amendment shall be liberally construed to effectuate this purpose."

In *Presque Isle Twp. School Dist. v. Presque Isle Co. Bd. of Ed.*, 364 Mich. 605, 612, 111 N.W.2d 853 (1961), this Court held:

> " 'It is too elementary to justify us in referring to authority on the question, that a legislative body is not permitted under any circumstances to declare what its intention was on a former occasion so as to affect past transactions. . . . Its members have no more right to construe one of its enactments retroactively than has any private individual.' "[1]

A review of the historical background that encompassed the enactment of 1981 P.A. 203 and 1987 P.A. 28 serves to illustrate the reasoning behind this prohibition.

As outlined below, the interpretation of § 354 imputed to the 1981 Legislature by the 1987 Legislature was erroneous. The 1981 Legislature was fully cognizant of the consequences of coordinating workers' compensation benefits, yet it enacted 1981 P.A. 203 in an attempt to stimulate a poor state economy by lowering the cost of doing business in Michigan.

A. 1981 P.A. 203

1981 P.A. 203 was part of a comprehensive reform of the Workers' Disability Compensation Act that was begun one year earlier.[2] The purpose of the reform, and specifically 1981 P.A. 203, was to reduce the cost to the business community of workers' compensation liability and to eliminate perceived abuses of the system. 1981 P.A. 203 was passed in December, 1981. During the period prior to the enactment of this legislation, Michigan had been struggling through a severe recession. A significant number of businesses either were closing down their local operations or leaving the state. The unemployment rate in Michigan during December 1981, was 14.4 percent,[3] and the 1981

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[1] Quoting *Northern Trust Co. v. Snyder*, 113 Wis. 516, 530, 89 N.W. 460, 90 Am.St.Rep. 867 (1902).

[2] *Franks v. White Pine Copper Div.*, 422 Mich. 636, 649-650, 375 N.W.2d 715 (1985).

[3] MESC Report No. 3221 (1981). Provided by the Business Research Office, Michigan Department of Commerce.

inflation rate for the City of Detroit in 1981 was 9.3 percent.[4] It was against this economic backdrop that the Legislature passed 1981 P.A. 203.[5]

As noted in *Chambers v. General Motors Corp.*, companion case of *Franks, supra* 422 Mich. at 655, 375 N.W. 2d 715, Governor William Milliken discussed his proposals to solve what he deemed the " 'biggest single liability to Michigan's job climate today [November 18, 1981]' ":[6]

> " 'To start with, we must keep in mind that the purpose of workers' compensation, after all, is to restore wage-earning capacity lost in on-the-job accidents. *Workers' compensation was never intended to be more lucrative than gainful employment* or to be a retirement bonus.
>
> " 'I have proposed that we coordinate benefits from different employer-paid sources so that workers receive the maximum benefits to which they are entitled, but no more. *It is only simple justice that an employer not be assessed costs for several different funds which result in reimbursing the injured worker for more than the lost wage-earning capacity.*' "[7] (Emphasis added.)

The Governor's concerns were echoed in the Senate Analysis Section, SB 573: First Analysis, p. 6 (January 7, 1982):

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[4] Consumer Price Index for the City of Detroit. Provided by the Business Research Office, Michigan Department of Commerce. Note, the Bureau of Labor Statistics computes the inflation rate only for major metropolitan cities. Detroit is the only city in Michigan for which the inflation rate is computed.

[5] The Senate passed the act by a vote of 26 yeas to 12 nays, SB 595, 1981 Senate Journal 2607. The House passed the act by a vote of 62 yeas to 43 nays, 1981 House Journal 2854.

[6] Remarks by Governor William G. Milliken to the Ann Arbor Chamber of Commerce on November 18, 1981.

[7] *Id.*

> "By coordinating workers' compensation benefits with Social Security and other benefits, *Senate Bill 595 [1981 PA 203] would provide a major savings to employers in the cost of workers' compensation while maintaining adequate benefit levels for disabled workers.* (Emphasis added.)
>
> * * * * * *
>
> "Since 1912, other public and private wage replacement insurance programs have appeared with the result that many employees now receive wage-loss benefits from two, three, or four different programs providing a total wage 'replacement' greater than the wages the employee earned while on the job, *while employers who must contribute to these programs find themselves paying more than once to replace the wages of a single employee.*" (Emphasis added.)

After SB 595 passed the House vote, five members of the House reserved the right to enter their protests against the passage of the bill. Rep. Cushingberry said:

> "This measure, while I'm sure will be reported as a major cost savings measure for business; it will prove to produce its benefits. The only thing this bill will do is to perhaps increase the burden on those less fortunate. . . . This outcome of our act tonight effectively cuts the benefits of even those who have a legitimate worker's disability." 1981 House Journal 2855.

Reps. Emerson and Vanek protested, "This provision that has been adopted will increase the likelihood that an injured employee could receive no worker's compensation benefit, hardly an incentive for employers of this state to maintain a safe workplace." *Id.* Rep. Kelsey stated:

> "Additionally, I supported the revisions of the system during the fall of 1980, which will take effect in January, 1982. To my dismay, however, the commitment to only do away with the abuses was not kept and it was decided by the proponents of revision to go all the way and not only to take care of the abuses

but, again, to abuse and deprive the legitimate victims of on-the-job injuries. It was proposed not only to reduce the length of benefits but also the amount of benefits received by the workers. . . . I could not, in good conscience, support the so-called revision *which would only add to the current economic depression* and harm the citizens of the State of Michigan." *Id.* at 2856. (Emphasis added.)

Finally, Rep. Elliot added:

"This package tonight will relieve many employers of their responsibilities to pay any worker's compensation benefits, *not only to older workers* but also to younger workers whose families may be entitled to social security benefits." *Id.* (Emphasis added.)

The 1981 Legislature knew exactly the consequences of SB 595. The purpose of the bill was to effectuate a cost saving reform for business, and to eliminate duplicate recovery of benefits. While some legislators strongly opposed 1981 P.A. 203, the majority felt the need for economic reform outweighed the "burden"[8] that may be felt by an injured worker receiving benefits from more than one source. Four years later, this Court upheld the clear legislative intent behind 1981 P.A. 203 when we *unanimously* held "that this statute clearly and unambiguously requires coordination of workers' compensation and other specified benefits for all compensable periods subsequent to its effective date, regardless of when the injury occurred." *Chambers*, *supra* 422 Mich. at 651, 375 N.W.2d 715. However, the 1987 Legislature not only disregarded our *Chambers* decision as having been "erroneously rendered," it

[8] I quote the word "burden" because the effect of the coordination of benefits is that an injured employee will receive benefits in an amount equal to what he is entitled, but nothing extra by way of duplicate benefits.

also ignored the legislative history that served as the basis for the *Chambers* decision.

B. 1987 P.A. 28

1987 P.A. 28 claims that the legislative intent of § 354 of 1981 P.A. 203 was "not to coordinate payments under this section . . . for personal injuries occurring before March 31, 1982." However, a review of the voting members of the 1987 Legislature indicates that this claim is impossible to sustain.

The 1987 amendment of § 354 was enacted in May 1987. At this time, Michigan was enjoying a much improved economic climate.[9] The level of unemployment was 8.2 percent[10] (down from the 1981 level of 14.4 percent), and the 1987 inflation rate for the City of Detroit was 3.0 percent[11] (down from the 1981 level of 9.3 percent). With Michigan industry in a much improved condition, and with a new Governor, the 1987 Legislature revisited the work of the 1981 Legislature.

The 1987 Legislature was displeased with the decision of this Court in *Chambers*, so it sought to correct our "erroneous" decision by providing its own "interpretation" of the intent of the 1981 Legislature. However, as pointed out by the appellants, only a fraction of the senators and

[9] Perhaps the reforms of the Workers' Disability Compensation Act that were enacted in 1981 served their intended purpose of helping Michigan businesses return to economic health.

[10] MESC Report No. 3221 (1987). Provided by the Business Research Office, Michigan Department of Commerce.

[11] 1987 Consumer Price Index. Provided by the Business Research Office, Michigan Department of Commerce. Detroit is the only Michigan city for which the United States Bureau of Labor Statistics computes the inflation rate. See n. 4.

representatives who voted in favor of 1981 P.A. 203 were still around to "interpret" the 1981 legislative intent with 1987 P.A. 28. Specifically, only eleven of the twenty-six senators[12] who voted in favor of 1981 P.A. 203 were still around to vote in favor of 1987 P.A. 28.[13] Similarly, only twenty of the sixty-two representatives[14] who voted in favor of 1981 P.A. 203 were around to vote in favor of 1987 P.A. 28.[15] Therefore, even though *less than half of the senators and less than one-third of the representatives from the 1981 Legislature* who voted in favor of 1981 P.A. 203 also voted in favor of 1987 P.A. 28, the 1987 Legislature claims that its amendment was the original intent of the 1981 Legislature. This is a claim with which I can not agree.

Furthermore, the claim of the 1987 Legislature that it provided the original intent of the 1981 Legislature flies in the face of the fact that those members of the 1981 Legislature who opposed 1981 P.A. 203 failed in their attempt to limit its application. As pointed out in *Chambers*, *supra* 422 Mich. at 659, 375 N.W.2d 715, a legislative resolution[16] was passed after the enactment of § 354 which attempted to prevent the coordination of benefits of per-

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[12] Senators Arthurhultz, DeGrow, DiNello, Faust, Fredricks, Gast, Geake, Irwin, Miller, Sederburg, and Welborn.

[13] The Senate vote in favor of 1987 P.A. 28 was 35 yeas, one nay, and two excused. 1987 Senate Journal 1232.

[14] Representatives Alley, Brotherton, Bryant, Dunaskiss, Dutko, Giese, Gilmer, Gnodtke, Griffin, Hillegonds, Johnson, Knight, Maynard, Ostling, Randall, Stacey, Stopczynski, Strand, Trim, and Van Singel. 1987 House Journal 1232.

[15] The House vote in favor of 1987 P.A. 28 was 95 yeas, zero nay. *Id.*

[16] Senate Concurrent Resolution No. 575 adopted by the Senate on April 1, 1982, 1982 Senate Journal 626, 706; adopted by the House on May 18, 1982, 1982 House Journal 1262.

sons injured prior to its effective date. This Court first noted that the resolution was an attempt by those who opposed 1981 P.A. 203 to subsequently limit its scope and then held:

> "Had the Legislature wanted to change § 354 to impose that limitation, it could have properly done so only by amendment. Although § 354 has been amended, such amendments have not limited its application with respect to date of injury. Finally, the respectful consideration to which legislative resolutions are entitled . . . is offset here by the fact that a bill introduced to achieve that result was defeated. [SB 834, introduced on May 20, 1982.]" *Id.*

In sum, the economic and political climate surrounding the enactment of 1987 P.A. 28 was vastly different from that in 1981. Only thirty-five percent of those members of the 1981 Legislature who voted in favor of 1981 P.A. 203 also voted in favor of the 1987 amendment. Also, the legislative history of 1981 P.A. 203 clearly contradicts the claim of the 1987 Legislature that 1987 P.A. 28 provided the original intent of the 1981 Legislature.

Through this scenario, the wisdom of the *Presque Isle Twp. School Dist.*, rule becomes evident—a legislative body is not permitted to declare what its intention was on a former occasion so as to affect past transactions. Therefore, I would conclude that the claim of the 1987 Legislature is nugatory.[17]

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[17] At the very least, just as the 1987 Legislature felt that our decision in *Franks*, *supra*, was erroneous, it is equally plausible that the interpretation imputed to the 1981 Legislature by the 1987 Legislature was erroneous.

II. REMEDIAL LEGISLATION v. SUBSTANTIVE CHANGE

The 1987 Legislature described 1987 P.A. 28 as a "remedial and curative amendment," § 354(17). This is a description with which the Court of Appeals agreed.[18] I do not share the same opinion.

The function of curative legislation is to "repair the consequences of legal accident or mistake." 2 Sands, Sutherland Statutory Construction (4th ed), § 41.01, p. 338. A legal accident or mistake "can be the result of the failure of the lawmakers to make provision for unforeseen circumstances which should have been provided for or the failure of parties to conform to nonessential legal requirements or limitations." *Id.*

The case before us today is not one of "legal accident or mistake." Quite the opposite is true. 1981 P.A. 203 was enacted at the conclusion of a comprehensive reform of the Workers' Disability Compensation Act. The Legislature had made the determination that the system was subject to abuse by employees who were receiving benefits from multiple sources. In turn, this would result in the employee receiving total benefits that were in excess of his workplace compensation. In order to eliminate this possibility, and to reduce the cost of workers' compensation to businesses, the coordination of benefits provision was enacted.

There was no "failure . . . to make provisions for unforseen circumstances." The Legislature enacted a statute that gave employers the right to coordinate benefits beginning on March 31, 1982. On October 7, 1985, this Court

[18] *Romein v. General Motors Corp.*, 168 Mich.App. 444, 455, 425 N.W.2d 174 (1988).

unanimously interpreted the statute to mean that employers have the right to coordinate benefit payments regardless of the date of injury. Consequently, after having the matter resolved by the highest court in the state, General Motors and Ford had the unquestionable right to coordinate the benefits of all employees receiving workers' compensation benefits who came under the provisions of 1981 P.A. 203.

Yet, nearly two years after the *Chambers* decision, and more than five years after the enactment of 1981 P.A. 203, the 1987 Legislature declared that General Motors and Ford did not have the right to coordinate benefits. Furthermore, § 354(19) of 1987 P.A. 28, required any amount so coordinated (pursuant to the statutory right as interpreted in *Chambers*), to be reimbursed *with interest*.

For a number of years, General Motors and Ford were coordinating benefit payments pursuant to their statutory right. At the very least, the companies were acting within the spirit of the law. Yet, this right was retroactively revoked by "remedial" legislation. Also, the "curative" legislation imposed upon the companies the added obligation of interest. Finally, 1987 P.A. 28 was enacted to invalidate this Court's decision in *Chambers*, thus effecting a substantive change in the law. *Hurd v. Ford Motor Co.*, 423 Mich. 531, 534, 377 N.W.2d 300 (1985).

"[T]he word of the 'curing' legislature should not be conclusive in determining what the prior representatives meant. The question of original intent is ultimately one for the reviewing court." Eule, *Temporal limits on the legislative mandate: Entrenchment and retroactivity*, 1987 Am. B. Found. Res. J. 379, 448. This Court had interpreted the original intent of the 1981 Legislature. Yet, our interpretation was rejected by the 1987 Legislature. Therefore, I can not agree that the 1987 amendment was "remedial

and curative." Rather, I would hold that the 1987 amendment amounted to a substantive change in the law.[19]

III. CONSTITUTIONAL ANALYSIS

A

The majority holds, "[t]he operative provisions of the statute do not encroach upon the sphere of the judiciary. Rather, they merely repeal the act that *Chambers* construed." Op., p. 20. However, this argument fails when reviewed against well-settled Michigan case law and the rules of statutory construction.

In *Wade v. Farrell*, 270 Mich. 562, 567, 259 N.W. 326 (1935), this Court unanimously[20] held:

> " 'When a statute continues a former statute law, that law common to both acts dates from its first adoption, and only such provisions of the old act as are left out of the new one are gone, and *only new provisions are new laws. Where an act is amended . . . the part of the original act which remains unchanged is considered as having continued in force as the law from the time of its original enactment* and the new portion as having become the law only at the time of the amendment.' 25 RCL p. 907." [21] (Emphasis added.)

[19] In fact, the language found in § 354(17) was added in an admitted attempt to "cure the [constitutional] defect." Statement of Sen. DeGrow after the Senate voted in favor of SB 67 (1987 P.A. 28), 1987 Senate Journal 1235-1236. See text, p. 15.

[20] The opinion was signed by the six justices who participated, Chief Justice Potter and Justices Fead, Wiest, Butzel, Bushnell, and Edward M. Sharpe. Justice Nelson Sharpe did not sit.

[21] See also *Perry v. Hogarth*, 261 Mich. 526, 530, 246 N.W. 214 (1933).

The rule quoted in *Wade*, mirrors the rule enunciated in 1A Sands, Sutherland Statutory Construction (4th ed), § 22.33, pp. 287-288:

> "Provisions of the original act or section which are repeated in the body of the amendment, either in the same or equivalent words, are considered a continuation of the original law. This rule of interpretation is applicable even though the original act or section is expressly declared to be repealed. . . . *The provisions of the original act or section reenacted by the amendment are held to have been the law since they were first enacted*, and the provisions introduced by the amendment are considered to have been enacted at the time the amendment took effect. Thus, rights and liabilities accrued under the provisions of the original act which are reenacted are not affected by the amendment." (Emphasis added.)

Our decision in *Chambers* interpreted the coordination of benefits provisions as pertaining to all benefit payments due after March 31, 1982, regardless of the date of injury. The majority claims that the 1987 P.A. 28 "repeal[ed] the act that *Chambers* construed." However, 1987 P.A. 28 adopted verbatim the language of the first fifteen sections of the original act, M.C.L. § 418.354(1)-(15); M.S.A. § 17.237(354)(1)-(15), and it is within these first fifteen sections that the coordination of benefits provisions are found.

Applying both Michigan law and the rules of statutory construction to the instant matter leads to the conclusion that the coordination of benefits provisions that were interpreted by this Court in *Chambers* were not repealed. Rather, because they were reenacted by adopting the identical language from the original act, the coordination of benefits provisions are " 'considered as having continued in force as the law from the time of [their] original enactment [March 31, 1982].' " *Wade*, *supra* 270 Mich. at 567, 259 N.W. 326.

B

Thus, I am persuaded that the declaration made by the 1987 Legislature in 1987 P.A. 28, § 354(17) that it was providing the legislative intent of the 1981 Legislature is clearly not supported by the economic, political, and legislative history behind the enactment of each amendment at issue here, 1987 P.A. 28 and 1981 P.A. 203. Moreover, it violates Michigan case law, *Presque Isle Twp. School Dist.*, *supra*. The amendment enacted by the 1987 Legislature was not "remedial and curative." Rather, it was a substantive change in the law. Finally, 1987 P.A. 28 did not repeal the legislative provisions that we interpreted in *Chambers*.

Therefore, the remaining question is, "What is the net effect of 1987 P.A. 28, and is the amendment constitutional?"

In my opinion, the net effect of 1987 P.A. 28 was nothing more than an attempt to "overrule" the decision of this Court in *Chambers*, to render the *Chambers* opinion null and void, as if it was never released.[22] This Court cannot surrender to this invasion into the constitutionally granted authority of the judicial branch.

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[22] After the 1987 Senate voted to pass SB 67 (1987 P.A. 28), Sen. Cherry, a member of the conference committee that prepared the bill, stated, "Additionally, I am pleased that the language in Section 354 will finally correct the gross injustice done by the Supreme Court's *Chambers* decision. It is a disgrace that has taken four years for the Legislature to act to rectify this situation which portrays a promise to many older workers." 1987 Senate Journal 1234-1235.

Query: Was the "gross injustice," as perceived by Sen. Cherry, a result of this Court's decision, or was it a result of the statutory language passed by the 1981 Legislature which this Court is duty bound to interpret?

It should come as no surprise to the Legislature that 1987 P.A. 28 was constitutionally defective. After SB 67 (1987 P.A. 28) was passed, Sen. DeGrow[23] commented:

> "Additionally, we've put in language that I think strengthens the argument that what we've done with the *Chambers* decision is constitutional. *We put in a preceding paragraph that tells what the intent of the Legislature was and will make stronger the argument that we haven't passed an unconstitutional act. I'm not sure it will cure the defect*, but I think we can feel a little better about ourselves in terms of voting for it; that it is not something that is unconstitutional." 1987 Senate Journal 1236. (Emphasis added.)

In his article, Professor Julian N. Eule notes, *supra* at 445:

> "The voters do not delegate authority to rewrite history. Their earlier agents exercised legitimate authority when they enacted legislation. While such efforts may be repealed, this is not the same as retrospective eradication. A decision that bills defeated by prior legislatures can now be enacted and treated as if they *had* been enacted earlier arguably runs afoul of this same principle.[24] The then-authorized representatives made a choice, and this decision demands recognition as the choice of the polity for that point in time. Each set of elected officials ought to be viewed as endowed by their sovereign with the mandate to make policy choices only within a bracketed temporal zone. Just as the delegation of authority does not encompass incursions into the domain of legislatures yet

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[23] Sen. DeGrow was a senate conferee for the Conference Report regarding 1987 P.A. 28. 1987 Senate Journal 1232.

[24] Keep in mind that a bill, introduced in an attempt to limit the application of the coordination of benefits provisions, was defeated. SB 834, introduced on May 20, 1982. See text, *supra* at 7.

> to come, it does not contemplate contravening the sanctity of time past." (Emphasis supplied.)

In *Bankers Trust Co. v. Russell*, 263 Mich. 677, 684, 249 N.W. 27 (1933), this Court reiterated the rule that to declare what the law shall be is a legislative power, and to declare what the law is, or has been, is a judicial power. The Court went on to hold, "[the Legislature] may not by statute attempt to exercise judicial power by construing a statute for the court." *Id.*[25]

The members of the 1981 Legislature were the "then-authorized representatives" who made their decisions based on the demands of the time. In 1981, they declared what the law "shall be" with regard to the coordination of benefit payments. In 1985, this Court interpreted what the "meaning" of the law was. Subsequently, the 1987 Legislature attempted to exercise judicial power by "rewrit[ing] history" in order to retroactively construe the statute for this Court, the effect of which was to eradicate the 1981 legislation. I find this to be an unconstitutional encroachment upon the judiciary.

In speaking about the problem of retroactivity, Justice Holmes once remarked, "[p]erhaps the reasoning of the cases has not always been as sound as the instinct which directed the decisions." *Danforth v. Groton Water Co.*,

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[25] Analogous to the current matter, in *Bankers Trust Co.*, the Legislature attempted to retroactively construe the term "trust mortgage" as used in 1929 CL 13498, 13499. The purpose behind the amendment was to assist owners of property and securities who had liens placed upon them as a result of the depression. Addressing the plight of the individuals adversely affected, the Court held, "Conflicting interests are involved in these cases, and *the court can but construe the statute in question as it reads, and not as equitable considerations might impel us to do.*" *Bankers Trust Co., supra* 263 Mich. at 684-685, 249 N.W. 27. (Emphasis added.)

178 Mass. 472, 476, 59 N.E. 1033, 86 Am.St.Rep. 495 (1901). Perhaps this is the case here. In any event, I believe that the circumstances surrounding the retroactive enactment of 1987 P.A. 28 evidence a particularly egregious intrusion upon the separation of powers and the "one court of justice" articles of the Michigan Constitution.[26]

IV. CONCLUSION

I am not yet prepared to accept the "slippery slope" argument that unless the Court acts now, the Legislature will usurp all of the constitutional authority granted to the judiciary. However, the Michigan Constitution of 1963 mandates the separation of powers between the three branches of government, art. 3, § 2, and declares that the judicial power of the state is vested in "one court of justice," art. 6, § 1.

Throughout history, courts of last resort have been called upon to make difficult decisions that may have run contrary to popular opinion. These decisions have included, but are certainly not limited to, issues involving criminal matters, civil rights, and economic legislation. It is necessary to have an equally powerful judicial branch of government in order to ensure that the balance of power is not

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[26] In his concurrence, Justice Brickley writes that while he is "[t]roubled" by the 1987 amendment, he must concur with the majority because of the failure of the United States Supreme Court to "articulate any discernible limits on the constitutionality of retroactive . . . legislation. . . ." Op., p. 2.

I note that the argument advanced by the appellants, as well as my dissent are based on the Michigan Constitution of 1963. Therefore, the lack of United States Supreme Court guidance is not fatal to the appeal.

Furthermore, only in a parliamentarian system of government is the judiciary subject to a superior legislature. In our republican system, the judicial branch is the equal of legislative branch.

weighted in favor of the Legislature, and to ensure that individual rights are not circumvented by the will of the majority. Therefore, in order for this Court to maintain its equal position within our tripartite system of government, we must secure our constitutionally granted authority.

While it is understandable that emotions may run in favor of an injured employee and against a large corporation, this Court "can but construe the statute in question as it reads, and not as equitable consideration might impel us to do." *Bankers Trust Co, supra* 263 Mich. at 684-685, 249 N.W. 27. See n. 25. In *Chambers*, we unanimously interpreted the intent of the 1981 Legislature when it enacted 1981 P.A. 203. In 1987, the Legislature "overruled" our decision.

Therefore, I would hold that the 1987 Legislature ran afoul of the separation of powers and the one court of justice articles of the Michigan Constitution when it gave retroactive effect to 1987 P.A. 28.

Accordingly, I would reverse the decision of the Court of Appeals and apply the amendment prospectively from the date of its enactment, May 14, 1987.

GRIFFIN, Justice (dissenting).

While I agree with the Chief Justice that 1987 P.A. 28 violates Michigan's constitutional requirement of separation of powers,[1] I write separately to register my strong view that the enactment also contravenes the United States Constitution's Fourteenth Amendment due process guarantee.

I

In 1985, this Court unanimously held in *Chambers v. General Motors Corp.*, 422 Mich. 636, 651, 375 N.W.2d 715 (1985), that § 354 of 1981 P.A. 203, which became effective March 31, 1982, "clearly and unambiguously" permitted coordination, after its effective date, of certain employer-financed benefits, regardless of the date of injury.

A subsequent Legislature passed 1987 P.A. 28, which amended § 354[2] by reenacting the section's original language verbatim and adding four new subsections, M.C.L. § 418.354(17)-(20); M.S.A. § 17.237(354)(17)-(20). These amendments were made effective May 14, 1987. Section 354(17) expressly states the purpose of the legislation:

> "The decision of the Michigan Supreme Court in *Franks v. White Pine Copper Division*, 422 Mich. 636 [375 N.W.2d 715] (1985) *is declared to have been erroneously rendered* insofar as it interprets this section, it having been and being the legislative intention not to coordinate payments under this section resulting from liability pursuant to section 351, 361, or 835 for personal injuries occurring before March 31, 1982. *It is the purpose of this amendatory act* to so affirm. This remedial and curative amendment shall be lib-

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[1] Const. 1963, art. 3, § 2 and art. 4, § 1.

[2] 1987 P.A. 28.

erally construed to effectuate this purpose." (Emphasis added.)

Section 354(19) provides that any coordination prior to the act's effective date "shall be considered to be an underpayment of compensation benefits, and the amounts withheld pursuant to coordination shall be reimbursed with interest. . . ."

Thus, the 1987 amendment of § 354 was enacted not only for the declared purpose of reversing this Court's decision in *Chambers*, *supra*, but also to impose retroactively upon employers a substantial increase in liability for compensable periods *prior* to the act's effective date.

II

It is fundamental that this Court, not the 1987 Legislature, is entrusted by the constitution with the power to determine the meaning of the 1981 statute. *Webster v. Rotary Electric Steel Co.*, 321 Mich. 526, 531, 33 N.W.2d 69 (1948) (the proper construction of a statute is a judicial function); *Bankers Trust v. Russell*, 263 Mich. 677, 249 N.W. 27 (1933) (the Legislature may not exercise judicial power by construing a statute). In the past, we have declared:

> " 'It is too elementary to justify us in referring to authority on the question, that a legislative body is not permitted under any circumstances to declare what its intention was on a former occasion so as to affect past transactions. . . . Its members have no more right to construe one of its enactments retroactively than has any private individual.' " *Presque Isle Twp. Bd. of Ed. v. Presque Isle Co. Bd. of Ed.*, 364 Mich. 605, 612, 111 N.W.2d 853 (1961) (quoting *Northern Trust Co. v. Snyder*, 113 Wis. 516, 530, 89 N.W. 460 (1902)).

Article 3, § 2 of the Michigan Constitution provides: "The powers of government are divided into three branches: legislative, executive and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution."

This Court has said: " 'To declare what the law shall be is legislative; to declare what it is or has been is judicial.' " *In re Manufacturer's Freight Forwarding Co.*, 294 Mich. 57, 63, 292 N.W. 678 (1940) (quoting *In re Application of Consolidated Freight Co.*, 265 Mich. 340, 343, 251 N.W. 431 [1933] [Potter, J., dissenting]). The Legislature, by enacting 1987 P.A. 28, not only declared what the law "shall be," but purported to declare what the intent of a prior Legislature "was."

Like other members of this Court, I am "troubled" by the Legislature's wording of § 354(17). I would go a step further, however, and state what should be obvious: the declaration by the 1987 Legislature concerning the intent of the 1981 Legislature is a nullity.

III

Many years ago another court explained why the policy against retroactivity is a fundamental principle of justice which limits legislative power:

> "Our constitutions do not admit the power assumed by the *Roman* prince; and the principle we are considering is now to be regarded as sacred. It is not pretended that we have any express constitutional provisions on the subject; nor have we any for numerous other rights dear alike to freedom and to justice. An *ex post facto* law, in the strict technical sense of the term, is usually understood to apply to criminal cases, and this is its meaning, when used

> in the constitution of the *United States*; yet laws impairing the previously acquired *civil* rights are equally within the reason of that prohibition and equally to be condemned. . . . [T]here is no distinction in principle, nor any recognized in practice, between a law punishing a person criminally, for a past innocent act, or punishing him civilly by divesting him of a lawfully acquired right. The distinction consists only in the degree of the oppression. . . ." *Dash v. Van Kleek*, 7 Johns 477, 505-506 (NY, 1811) (emphasis in original).

The fundamental distrust of retroactive laws has found expression in our rules of statutory interpretation which favor prospective application. DeMars, *Retrospectivity and retroactivity of civil legislation reconsidered*, 10 Ohio N.U.L.R. 253, 259 (1983). Moreover, because "[r]etroactive legislation has always been looked upon with disfavor . . . even its constitutionality has been conditioned upon a rationality requirement *beyond that applied to other legislation*." *Bowen v. Georgetown University Hosp.*, 488 U.S. 204, 223, 109 S.Ct. 468, 479, 102 L.Ed.2d 493 (1988) (Scalia, J., concurring, emphasis added, citations omitted).

As the majority concedes, the retroactive aspects of 1987 P.A. 28 are different from those which were found constitutional by the United States Supreme Court in *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 104 S.Ct. 2709, 81 L.Ed.2d 601 (1984), and *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 96 S.Ct. 2882, 49 L.Ed.2d 752 (1976). The differences are materially significant. Legislation scrutinized in those cases does not compare to the enactment here which was deliberately designed to disrupt retroactively past transactions completed in reliance upon this Court's specific holding in *Chambers* that all workers' compensation payments were subject to § 354 coordination regardless of the date of injury.

In *R.A. Gray & Co.*, the retroactive application of the legislation was restricted to a short five-month period preceding the statute's effective date. This retroactivity, according to the Court, was necessary in order to provide Congress time to legislate without a governmental agency suffering severe economic consequences resulting from employers withdrawing from multiemployer pension plans. In affirming the constitutionality of the legislation, the Court explicitly noted that,

> "the enactment of retroactive statutes 'confined to *short and limited periods* required by the practicalities of producing national legislation . . . is a customary congressional practice.' We are loathe to reject such a common practice when conducting the limited judicial review accorded economic legislation. . . ." 467 U.S. at 731, 104 S.Ct. at 2719 (emphasis added, citation omitted).

Moreover, the Court cautioned that,

> "retroactive legislation *does* have to meet a burden *not* faced by legislation that only has future effects. 'It does not follow . . . that what Congress can legislate prospectively it can legislate retrospectively. The retroactive aspects of legislation, as well as the prospective aspects, must meet the test of due process, *and the justifications for the latter may not suffice for the former.*' " *Id.* at 730, 104 S.Ct. at 2718 (emphasis added).

In *Usery*, Congress enacted legislation requiring, inter alia, coal mine operators to compensate employees for black lung disease contracted during employment which had been terminated long before the effective date of the statute. In finding that the retroactive aspect of the legislation passed constitutional muster, the Supreme Court stated:

> "To be sure, insofar as the Act requires compensation for disabilities bred during employment terminated before the date of enactment, the Act has some retrospective effect—*although, as we have noted, the Act imposed no liability on operators until 1974*. . . .
>
> "[O]ur cases are clear that legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations. . . . *This is true even though the effect of the legislation is to impose a new duty or liability based on past acts.*" 428 U.S. at 15-16, 96 S.Ct. at 2893 (emphasis added).

Justification for such retroactive legislation can be found in the fact that black lung disease develops over a long period of time and its symptoms, in many instances, do not become apparent until after termination of employment. *Usery*, *supra* at 7-8, 96 S.Ct. at 2888-89. No analogous justification appears in this case to justify undoing completed transactions.

More fundamentally, neither Congress nor the United States Supreme Court had affirmatively spoken on the issue of a coal mine operator's responsibility for black lung disease prior to enactment of the legislation considered in *Usery*. There the Supreme Court specifically recognized that the aggrieved party's reliance upon the prior state of the law is a factor in determining whether retroactive application of a statute can be legitimate. 428 U.S. at 17, 96 S.Ct. at 2893. It is one thing, however, to "rely" on the absence of law, and quite another to rely on an affirmative statement of the law as enacted by the Legislature and construed by the state's court of last resort.

It should be stressed that, prior to the majority's decision today, this Court never recognized or sanctioned a legislative attempt to overrule retroactively a decision of

this Court.[3] Nor has the United States Supreme Court given consideration to the effect of retroactive legislation upon conduct occurring after judicial interpretation but before the "overruling" legislation was enacted. However, one commentator noted the implications when he wrote, "Prima facie, this would seem to form a distinct problem, since such conduct would apparently be patterned after the first judicial interpretation and therefore unjustly undercut by the legislation. . . ." Slawson, *Constitutional and legislative considerations in retroactive lawmaking*, 48 Cal. L. R. 216, 249 (1960). Where a particular individual can "prove he had in fact relied on the interim state of the law to his detriment . . . it seems clear that he should be entitled to relief." *Id.*

The reliance by appellants on our decision in *Franks* was substantial. It appears that their increased liability by virtue of the majority's decision today, without reference to its effect upon other employers, will exceed $22 million. I do not agree with the majority's position that the reliance interest of appellants is inconsequential because it was not reduced to judgment. Such an assertion ignores the fact that appellants had no reason to seek a judgment. As we ruled in *Franks*, *supra*, the 1981 statute permitted employers to coordinate benefits without institution of any type of proceedings. 422 Mich. at 661, 375 N.W.2d 715.[4]

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[3] Of course, no question is raised concerning the Legislature's power to enact legislation which may have the effect *prospectively* of overruling a decision of this Court. See, e.g., *Hurd v. Ford Motor Co.*, 423 Mich. 531, 377 N.W.2d 300 (1985) (enactment intended to overrule *Deziel v. Difco Laboratories, Inc.* (*After Remand*), 403 Mich. 1, 268 N.W.2d 1 (1978) (has prospective effect).

[4] To be sure, this Court has, on occasion, upheld the validity of retroactive legislation. However, a distinction must be drawn be-

(Footnote continued on following page)

I agree with the majority that "[t]he Legislature possesses the authority to enact workers' compensation laws

[4] *continued*
tween legislation that modifies benefits and liabilities prospectively based on prior conduct, and that which alters completed transactions. We recognized the distinction in *Franks*. While construing the original version of § 354, the Court said,

"We . . . disagree with the board's assumption that application of the coordination of benefits provision of § 354 to workers' compensation payments for compensable periods *after the effective date of the statute* would constitute retrospective application simply because the liability is based upon an injury that occurred prior thereto. As the board accurately observed . . . 'it is not contended that compensation benefits should be retroactively coordinated or reduced. Rather it is argued that the benefits of *all* disabled workers should be *prospectively* coordinated after the effective date of the enactment *regardless of when they were injured.*' " 422 Mich. at 652-653, 375 N.W.2d 715 (first emphasis added, later emphasis in original, citation omitted).

In contrast to a statute like original § 354 which prospectively altered benefit levels based on a past injury, this Court noted that § 358 of 1980 P.A. 357 appeared to be "purely" retroactive. That section provided:

"Net weekly benefits payable under section 351, 361, or lump sum benefits under section 835, shall be reduced by 100% of the amount of benefits paid or payable to the injured employee under the Michigan employment security act, Act No. 1 of the Public Acts of the Extra Session of 1936, as amended, being sections 421.1 to 421.67a of the Michigan Compiled Laws, for identical periods of time and chargeable to the same employer."

In determining whether § 354 was intended to operate retroactively, we said:

"Although a statute is not regarded as operating retrospectively merely because it relates to an antecedent event, as we have already observed, application of the provisions of § 358 to impose a disability, in the form of a setoff, upon the amount of workers' compensation time periods *prior to the effective date of the legislation in question*, is purely retroactive." 422 Mich. at 671, 375 N.W.2d 715. (Emphasis added.)

This Court held that because § 358 was not merely procedural or remedial, and since it affected the substantive right of workers to receipt of payments existing prior to the statute's effective date, the statute was not to be applied retrospectively. 422 Mich. at 673, 375 N.W.2d 715.

that ' "increase the burden on the employer for disability or expenses *occurring or continuing after the date of enactment* of the amendatory statute, even though the accident which gave rise to the disability or expenses had occurred prior to that time." ' " Op. p. 563 (quoting *Lahti v. Fosterling*, 357 Mich. 578, 592, 99 N.W.2d 490 (1959) (emphasis added). Unlike the majority, however, I would emphasize the word "after." Our past cases have limited the retroactive effect of such legislation by applying a change in benefit levels to those payments due *after* the effective date of an enactment. See *Lahti*, *supra* (amendment eliminating twenty-four-month limit on employer's liability for medical care could be retroactively applied to the extent that employers required to provide extended medical care to worker *after* the amendment's effective date notwithstanding that the injury occurred *before* the effective date), *McAvoy v. H.B. Sherman Co.*, 401 Mich. 419, 258 N.W.2d 414 (1977) (the statute prohibiting a stay of seventy percent of benefits pending appeal of the referee's decision awarding compensation only applies to those benefits accruing after the statute's effective date), *Selk v. Detroit Plastic Products*, 419 Mich. 1, 345 N.W.2d 184 (1984) (under statute increasing interest on workers' compensation award, where benefit payment is made *after* the effective date of the statute, interest is to be computed at twelve percent from the date the payment was due), *Franks*, *supra* (statute permitting coordination of benefits is *prospectively* coordinated *after* the effective date of the enactment regardless of when the employee was injured).

The majority concedes that the appellants' "reliance on the preexisting state of the law should be considered" in determining whether retroactive legislation is constitutional. Op., p. 563. However, the majority then asserts that appellants' reliance was not reasonable because the preexisting law was in "a state of flux." *Id.* at 563. I dis-

agree. After the Legislature enacts a statute which, according to this Court, "clearly and unambiguously" permits coordination of benefits without regard to date of injury, the law is not in a "state of flux." Given that this Court has never before recognized legislation purporting to overrule retroactively a decision by this Court interpreting the enactment of a prior Legislature, it could hardly be said that these appellants were on notice that the law might be changed in such a manner. Under the majority's analysis, the appellants apparently had no right to rely upon either the 1981 legislation or this Court's decision in *Franks*. Presumably, if the majority's analysis were correct, no employer or employee in this state would have the right to rely now upon 1987 P.A. 28 since the Legislature may change it retrospectively in its entirety tomorrow, next week, or next year.

As a matter of common sense, a citizen's reliance upon a statute as a statement of the law reasonably increases once the state's highest court interprets and declares what the statute means. To be sure, an individual can have no legitimate expectation that such a statute will not be subsequently changed prospectively; yet, it has been considered reasonable, at least until the majority's decision today, to expect that a statute will not be altered so as to reopen and significantly alter past transactions which have been completed in reliance upon the statute and its interpretation by the Court.

To dismiss, as the majority does, the argument of appellants that they justifiably relied on this Court's ruling in *Chambers* with the shibboleth that one may not expect that a socioeconomic law will not be retroactively changed, is to ignore the bounds of reason and fairness. As pointed out by Sutherland,

> "Analysis of the practical considerations influencing the question whether a retroactive application of a new law is fair and just should afford more meaningful standards of judgment than either catchpenny phrases or the ambivalent concept of 'vested.' . . .
>
> "One of the fundamental considerations of fairness recognized in every legal system is that settled expectations honestly arrived at with respect to substantial interests ought not to be defeated." 2 Sands, Sutherland Statutory Construction (4th ed), § 41.05, pp. 365-366.

Taking the majority's analysis to its logical conclusion would permit the Legislature to overrule decades-old decisions of this Court and impose retroactive liability for completed transactions conducted in accordance with those decisions, subject only to the nebulous requirement that the legislation is supported by any "legitimate legislative purpose." In order to protect this Court's status as the final arbiter of what the law is, and to secure the guarantee of due process, I would hold that the Legislature may not retroactively undo past transactions completed in reliance upon a decision of this Court.

Accordingly, I would reverse the decision of the Court of Appeals.

APPENDIX B

Evert Romein,
Plaintiff-Appellant,
v.
General Motors Corporation,
Defendant-Appellee,

Attorney General Frank J. Kelley,
Intervening Defendant-Appellee.

Arturo Gonzalez,
Plaintiff-Appellee,
v.
Ford Motor Company,
Defendant-Appellant,

Attorney General Frank J. Kelley,
Intervening Defendant-Appellee

Docket Nos. 101298, 101510

Court of Appeals of Michigan

Submitted January 14, 1988, Decided, May 16, 1988

JUDGES: Shepherd, P.J., and Wahls and G. B. Ford,* JJ.

OPINION BY: WAHLS

These consolidated cases require us to determine the constitutionality of statutory amendments to the Workers' Disability Compensation Act, MCL 418.101 *et seq.*; MSA 17.237 (101) *et seq.* Those amendments, set forth in 1987 PA 28, MCL 418.354(17)-(20); MSA 17.237 (354)(17)-(20), provide, in part, that workers' compensation payments resulting from liability pursuant to §§ 351, 361 or 835 of the act for personal injuries occurring before March 31, 1982,

* Recorder's Court judge, sitting on the Court of Appeals by assignment.

should not be coordinated with other employer-financed benefits specified in § 354, and that, if an employee's benefits were so coordinated previously, reimbursement with interest of the amounts withheld should be made. The employers in the present cases argue that the amendments, which are applicable retroactively to cases involving injuries which occurred before March 31, 1982, first, "violate the due process and contract clauses of the federal and state constitutions by retroactively imposing additional liability upon employers for past compensable periods," and, second, "violate the separation of powers and the one court of justice clauses of the Michigan constitution of 1963." We disagree and conclude that neither of these constitutional challenges possesses merit.

BACKGROUND

In order to place in context the issues presented in this case, it is necessary to review briefly the legislative history of the challenged statute. In 1980 and 1981, the Legislature enacted several amendments to the Workers' Disability Compensation Act. As part of those amendments, the benefit rate structure was changed, providing for an increase in weekly compensation from two-thirds of an employee's average weekly wages to eighty percent of an employee's after-tax average weekly wages. 1980 PA 357 MCL 418.351; MSA 17.237(351). Another portion of the workers' compensation reforms, 1981 PA 203, which became effective on March 31, 1982, reduced an employer's liability for workers' compensation benefits by the amount of certain other employer-financed benefits (e.g, social security old-age insurance, pension, retirement, wage continuation, self-insurance, disability insurance) received by the employee. MCL 418.354; MSA 17.237(354). This setoff or "coordination" of benefits was intended to eliminate the duplication of benefits for injured workers and thus avoid creating a disincentive to work.

After § 354 became effective on March 31, 1982, some employers began to coordinate the workers' compensation benefits of many of their retired or disabled employees, including some employees who had been injured prior to March 31, 1982. As a result, employees injured before that date were being subjected to a reduction of benefits through coordination, even though they did not receive the increased maximum benefit rates pursuant to the statutory amendment. In *Chambers v. General Motors Corp.*, 1982 WCABO 132, the Workers' Compensation Appeal Board held that the § 354 coordination-of-benefits provision could not be applied to claimants injured before March 31, 1982. Similarly, this Court, in *Franks v. White Pine Copper Division, Copper Range Co.*, 122 Mich. App. 177, 184-185, 332 N.W.2d 447 (1982), observed that the Legislature did not intend for employees injured before March 31, 1982, to have their workers' compensation benefits coordinated, citing Senate Concurrent Resolution No. 575, which stated that the coordination legislation in § 354 "was not designed to disrupt benefits which were already being received by an employee prior to the effective date of this act or benefits resulting from injuries incurred prior to the act's effective date," and that the coordination of benefits provided for in § 354 was "not to be applied retroactively to those receiving worker's disability compensation payments or those injured prior to the effective date of this act."

Nevertheless, the Supreme Court, in reviewing *Chambers*, *Franks*, and a third consolidated case, held that the Legislature in fact intended that the benefits of all disabled employees be coordinated after March 31, 1982, even if some of those employees were injured before that date. *Franks v. White Pine Copper Div.*, 422 Mich. 636, 664, 375 N.W.2d 715 (1985). Based on the Supreme Court's decision in *Franks*, employers who had been coordinating the workers' compensation benefits of employees injured

before March 31, 1982, could continue to coordinate those benefits, and some employers who had not been coordinating the benefits of their disabled employees who were injured before March 31, 1982, required those employees to pay back the money that had been "overpaid" to them since that date.

On December 30, 1985, the Supreme Court denied a motion to rehear the consolidated cases. However, the author of the *Franks* decision, Justice Patricia J. Boyle, dissented, voting to grant the motion for rehearing. Justice Boyle opined that reconsideration led her to believe—contrary to her earlier expressed view that the plain meaning of § 354 required the coordination of benefits for all disabled employees after March 31, 1982—that the language of § 354 "is ambiguous and requires construction," and that "[the] incorrect methodology of our opinion leaves serious questions regarding the original decision in these cases." 424 Mich. 1203. Moreover, Chief Justice Williams and Justice Cavanagh, while concurring in the denial of the motion for rehearing, wrote separately to clarify that their denial intimated no opinion regarding employers' attempts to recoup overpayments.

There was significant public reaction criticizing the Supreme Court's decision in *Franks*. Critics included members of the Legislature that had passed § 354; James M. Brakora, Director of the Bureau of Workers' Disability Compensation; and former Governor William G. Milliken. In a letter dated October 25, 1985, Governor Milliken stated that the Supreme Court had misconstrued the intent of his administration and the Legislature because "[it] was not our intent that the coordination apply in any way to persons who had suffered their injuries prior to the effective date of the amendments." In response to the *Franks* opinion, the Legislature adopted 1987 PA 28, which became effective on May 14, 1987, the relevant portions of which provide:

(17) The decision of the Michigan Supreme Court in *Franks v. White Pine Copper Division*, 422 Mich. 636 (1985) is declared to have been erroneously rendered insofar as it interprets this section, it having been and being the legislative intention not to coordinate payments under this section resulting from liability pursuant to sections 351, 361, or 835 for personal injuries occurring before March 31, 1982. It is the purpose of this amendatory act to so affirm. This remedial and curative amendment shall be liberally construed to effectuate this purpose.

(18) This section applies to payments resulting from liability pursuant to sections 351, 361 or 835 for personal injuries occurring on or after March 31, 1982. Any payments made to an employee resulting from liability pursuant to sections 351, 361, or 835 for a personal injury occurring before March 31, 1982 that have not been coordinated under this section as of the effective date of this subsection shall not be coordinated, shall not be considered to have created an overpayment of compensation benefits, and shall not be subject to reimbursement to the employer or carrier.

(19) Notwithstanding any other section of this act, any payments made to an employee resulting from liability pursuant to sections 351, 361, or 835 for a personal injury occurring before March 31, 1982 that have been coordinated before the effective date of this subsection shall be considered to be an underpayment of compensation benefits, and the amounts withheld pursuant to coordination shall be reimbursed with interest, within 60 days of the effective date of this subsection, to the employee by the employer or carrier.

(20) Notwithstanding any other section of this act, any employee who has paid an employer or carrier money alleged by the employer or carrier to be owed the employer or carrier because that employee's benefits had not been coordinated under this section and whose date of personal injury was before March 31, 1982 shall be reimbursed with interest, within 60 days of the effective date of this subsection, that money by the employer or carrier. [MCL 418.354 (17)-(20); MSA 17.237(354) (17)-(20).]

FACTS AND PROCEDURAL HISTORY

In Docket No. 101298, plaintiff, Evert Romein, was receiving workers' compensation benefits of $99 per week due to injuries he sustained on December 5, 1977, while working for defendant, General Motors Corporation. In September, 1983, GMC began coordinating Romein's workers' compensation benefits based upon his receipt of pension and social security old-age benefits. As a result of this coordination, his benefits were reduced to zero dollars. In June, 1984, a hearing referee in the Bureau of Workers' Disability Compensation ordered that Romein's workers' compensation benefits be paid without coordination and that GMC pay a $1,500 penalty. On May 20, 1987, the WCAB, citing the Supreme Court's decision in *Franks*, reversed the referee's determination, prompting Romein to apply for leave to appeal in this Court.

In Docket No. 101510, plaintiff, Arturo Gonzalez, was receiving workers' compensation benefits of $176 per week pursuant to a voluntary agreement of the parties due to a disabling lung condition Gonzalez allegedly had developed as a consequence of his exposure to certain materials while working for defendant, Ford Motor Company. In August, 1982, Ford began to coordinate Gonzalez's benefits with other benefits he received, thus reducing his weekly workers' compensation payment to zero dollars. In September, 1984, a hearing referee in the Bureau of Workers' Disability Compensation found that Ford had improperly coordinated and reduced Gonzalez's benefits, and ordered Ford to pay a $1,500 penalty. On May 27, 1987, the WCAB, citing 1987 PA 28, found that Ford

could not coordinate Gonzalez's benefits, prompting Ford to apply for leave to appeal in this Court.

In September, 1987, this Court granted leave to appeal in both cases, consolidating them for accelerated consideration.[1]

ISSUES

First, GMC and Ford argue that subsections 17 through 20 of § 354 violate the due process, U.S. Const., Am. XIV; Const. 1963, art. 1, § 17, and impairment of contract, U.S. Const., art. I, § 10; Const. 1963, art. 1, § 10, clauses of the United States and Michigan Constitutions by retroactively imposing an additional obligation upon employers, i.e., "by retroactively imposing additional liability upon employers for past compensation periods." We disagree with this argument because the challenged retroactive legislation is justified by a rational legislative purpose, *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15, 96 S. Ct. 2882, 49 L. Ed. 2d 752 (1976); *Pension Benefit Guaranty Corp. v. R. A. Gray & Co.*, 476 U.S. 717, 730, 104 S. Ct. 2709, 81 L. Ed. 2d 601 (1984). Most important to our conclusion is that the retroactivity of the legislation does not abrogate a vested or contractual right of the employers in the consolidated cases before us. Indeed, we find that the employers enjoy no extrastatutory, vested or contractual right in these cases which could prohibit the Legislature from making a retroactively applicable change, at

[1] Subsequent to the date these consolidated cases were submitted to this Court for decision and oral argument was conducted, counsel for the parties unilaterally filed supplemental briefs, including a letter and exhibit by counsel for defendants, a reply by counsel for plaintiffs, and a response to plaintiffs' reply by counsel for defendants. These documents were improperly filed, MCR 7.212(F), and shall not be considered by this Court in rendering its decision, MCR 7.212(H).

any time, in the remedies afforded employees under the statutory provision now at issue.

The Workers' Disability Compensation Act is remedial in nature and was enacted primarily to benefit the employees, not the employers, subject to its provisions. *Norwin v. Ford Motor Co.*, 132 Mich. App. 790, 795, 348 N.W.2d 703 (1984), lv. den. 424 Mich. 871 (1986); *Lahti v. Fosterling*, 357 Mich. 578, 589, 99 N.W.2d 490 (1959). Moreover, the social and legal context in which subsections 17 through 20 of § 354 were enacted makes it clear to us that the Legislature was prompted to act by the desire to remedy a situation in which certain employees were receiving coordinated workers' compensation benefits pursuant to § 354 but with the disadvantage of also receiving pre-1980 rates. Indeed, subsection 17 itself describes the amendatory subprovisions as "remedial and curative." We cannot quarrel with this description.

Moreover, in the *Franks* opinion itself, the Supreme Court stated that "[w]orkers' compensation benefits are social-welfare income-maintenance benefits" and declared, citing *Lahti*, *supra*, pp. 591-592, and *Shavers v. Attorney General*, 402 Mich. 554, 620, 267 N.W.2d 72 (1978), that "[i]ncome-maintenance benefits payable under a legislatively mandated social welfare program are not property protected by the Due Process Clause, the Contract Clause, or the Takings Clause from substantive change by subsequent legislation. . . ." 422 Mich. 654. See also *Rookledge v. Garwood*, 340 Mich. 444, 452-457; 65 N.W.2d 785 (1954); *Crilly v. Ballou*, 353 Mich. 303, 307-308, 91 N.W.2d 493 (1958); *Lahti*, *supra*; *McAvoy v. H. B. Sherman Co.*, 401 Mich. 419, 456-460, 258 N.W.2d 414 (1977); *Karl v. Bryant Air Conditioning Co.*, 416 Mich. 558, 575, 331 N.W.2d 456 (1982); *Selk v. Detroit Plastic Products*, 419 Mich. 1, 12-15, 345 N.W.2d 184 (1984); *Freij v. St. Peters Evangelical Lutheran Church*, 72 Mich. App. 456, 250 N.W.2d 78 (1976),

lv. den. 399 Mich. 862 (1977); Hochman, *The supreme court and the constitutionality of retroactive legislation*, 73 Harv. L. R. 692, 704-706 (1960); Note, *Rediscovering the contract clause*, 97 Harv. L. R. 1414, 1427 (1984). The right of the employers in these consolidated cases to coordinate the workers' compensation benefits of employees whose benefits were paid as a result of their employers' liability for personal injuries sustained prior to March 31, 1982, is derived from § 354, and thus is a statutory right. The Supreme Court has clarified that "a statutory right, though a valuable right, is not a vested right, and the holder thereof may be deprived of it." *Lahti*, *supra*, p. 589. Since the legislation challenged by the employers in the instant cases is remedial in nature, and since the employers' right to coordinate the workers' compensation benefits of the employees at bar is not a vested right, it follows with syllogistic certainty that § 354(17)-(20) may operate retrospectively: "A remedial or procedural statute may operate retrospectively if it does not 'take away vested rights.' " *Karl*, *supra*, p. 575. See DeMars, *Retrospectivity and retroactivity of civil legislation reconsidered*, 10 Ohio North L. R. 253, 261-264 (1983). The right to coordinate workers' compensation benefits relied upon by GMC and Ford was conferred by the Legislature and was revoked by the Legislature. What the Legislature gave, it could take away. *Rookledge*, *supra*, p. 457; *Lahti*, *supra*, pp. 588-589; *Franks*, *supra*, p. 654.

Second, GMC and Ford argue that subsections 17 through 20 of § 354 violate the separation of powers, Const. 1963, art. 3, § 2, and the one court of justice, Const. 1963, art. 6, § 1, clauses of the Michigan Constitution. The employers reason that, after the Supreme Court, in *Franks*, *supra*, declared what the law is under § 354 regarding an employer's ability to coordinate the workers' compensation benefits of employees such as those in the present cases,

the Legislature, by passing subsections 17 through 20 of § 354, in an attempt to change retroactively what the Court had declared, usurped a judicial function. In their brief on appeal, the employers in these cases place great emphasis on the assertion that it is "unprecedented in the law" for a Legislature to reverse and overrule a court decision by passing a statute with retroactive applicability.

We find the employers' suggestion regarding the unprecedented nature of the challenged legislation to represent an indulgence in hyperbole. Such legislation may be included in that type of statutory enactment denominated as "curative." Curative legislation has been defined as legislation enacted to cure defects in prior law. 2 Sands, Sutherland Statutory Construction (4th ed.), § 41.11, p. 410. See Note, *Congressional reversal of supreme court decisions: 1945-1957*, 71 Harv. L. R. 1324 (1958) Hochman, *The supreme court and the constitutionality of retroactive legislation*, 73 Harv. L. R. 692 (1960). As an example, we will cite a recent occurrence of such legislation in the federal forum. In 1981, the United States Supreme Court held that the term "wages" must be interpreted consistently for purposes of both income-tax withholding and the Federal Insurance Contributions Act (FICA). *Rowan Companies, Inc. v. United States*, 452 U.S. 247, 101 S. Ct. 2288, 68 L. Ed. 2d 814 (1981). In 1983, Congress partially codified and partially overruled the Supreme Court's holding in *Rowan* by amending the Social Security Act to, among other things, permit the Treasury Department to interpret the term "wages" differently for income-tax withholding and FICA purposes. Social Security Amendments of 1983, Pub. L. No. 98-21, 97 Stat. 65, codified at 26 U.S.C. 3121(a). In 1984, Congress passed a provision making the 1983 change retroactively applicable to instances predating the 1983 amendment. Deficit Reduction Act of 1984, Pub. L. No. 98-369, 98 Stat. 494, 1160. In

the wake of the statutory amendments, courts have recognized that Congress acted in reaction to the Supreme Court's decision in *Rowan*, and in fact intended to overturn the underlying premise in that decision that the term "wages" must be interpreted consistently for purposes of both income-tax withholding and the FICA. See *Temple University v. United States*, 769 F.2d 126 (CA 3, 1985), cert. den. ____ U.S. ____, 106 S. Ct. 2914, 91 L. Ed. 2d 544 (1986); *Canisius College v. United States*, 799 F.2d 18 (CA 2, 1986), cert. den. ____ U.S. ____, 107 S. Ct. 1887, 95 L. Ed. 2d 495 (1987); *McCoy v. Comm'r of Internal Revenue*, 809 F.2d 333 (CA 6, 1987), app. pending; *John Carroll University v. United States*, 643 F. Supp. 675 (N.D. Ohio, 1986).[2]

We find the employers' argument on this issue to be meritless. The Legislature, in passing subsections 17 through 20 of § 354, did not attempt to direct the courts in the exercise of judicial power or to infringe on that power in any way; rather, it merely sought to cure a defect in a prior law erroneously interpreted by the Supreme Court. As noted in plaintiffs' briefs on appeal, the Legislature's amendatory language simply makes "explicit [the] . . . retrospective legislative purpose which the Supreme Court found in [*Franks*] to be wanting in the 1981 version of Section 354." Under such a circumstance, we detect no violation of the separation of powers or the one court of justice clause of the Michigan Constitution.

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[2] For other cases in which courts have recognized a Legislature's right to cure retroactively a court's erroneous interpretation of a statute, see, e.g., *Battaglia v. General Motors Corp.*, 169 F.2d 254 (CA 2, 1948), cert. den., 335 U.S. 887; 69 S. Ct. 236; 93 L. Ed. 425 (1948); *Fisch v. General Motors Corp.*, 169 F.2d 267 (CA 6, 1948), cert. den., 335 U.S. 902; 69 S. Ct. 405; 93 L. Ed. 436 (1949); *Long v. United States Internal Revenue Service*, 742 F.2d 1173 (CA 9, 1984); *Bd. of Ed. of East Windsor Regional School Dist. v. Diamond*, 808 F.2d 987 (CA 3, 1986).

Since we uphold the validity of § 354(17)-(20) despite the constitutional challenges raised by the employers in these consolidated cases, we affirm the WCAB's decision in the appeal of Arturo Gonzalez and reverse the decision in the appeal of Evert Romein. However, in light of the confusion in the law regarding the issues presented in these cases, and the fact that a substantial question of statutory construction was involved, we find that penalty benefits should not be assessed against the employers. MCL 418.801(2); MSA 17.237(801)(2).

The decision in *Romein* is reversed and the decision in *Gonzalez* is affirmed as modified.

APPENDIX C

ORDER

MICHIGAN SUPREME COURT

ENTERED: December 27, 1990

EVERT ROMEIN,
Plaintiff-Appellee,
and
ATTORNEY GENERAL FRANK J. KELLEY,
Intervenor-Appellee,
v.
GENERAL MOTORS CORPORATION,
Defendant-Appellant.

SC: 83830-1
COA: 101298, 101510
LC: WCAB NO. 373, 108

ARTURO GONZALEZ,
Plaintiff-Appellee,
and
ATTORNEY GENERAL FRANK J. KELLEY,
Intervenor-Appellee,
v.
FORD MOTOR COMPANY,
Defendant-Appellant

Supreme Court of Michigan
December 27, 1990, Entered

On order of the Court, the motion by defendants-appellants for a stay is considered.

IT IS ORDERED that until final resolution of these consolidated cases by the United States Supreme Court, the parties to this action, the parties to *Michigan Mutual Insurance Co*, Court of Appeals Case No. 104980, and all other persons who receive actual notice of this Order, by personal service or otherwise, are restrained from enforcing or acting under the retroactive provisions of 1987 PA 28, subsections 345 (17)-(20), MCL 418.354(17)-(20), insofar as these subsections relate to workers suffering personal injury before March 31, 1982 and would otherwise require reimbursement of worker's disability compensation payments coordinated pursuant to section 354 during compensable periods after March 31, 1982 and before May 14, 1987.

This Order is issued to enable defendants-appellants to seek issuance of a writ of certiorari from the United States Supreme Court. If an application for a writ of certiorari is not made within the period allotted therefor, an order granting the application is not made or the conditions of MCR 7.209(F)(1) are not complied with, then the Court will vacate this Order. Upon the vacating of this Order, subsections 354(17)-(20) of 1987 PA 28, MCL 418.354(17)-(20) shall become enforceable according to their terms, including payment pursuant to subsection 354(19) within 60 days of the date this Order is vacated.

No security is required of any party, person or firm.

Cavanagh and Boyle, JJ., would deny the motion for stay.

APPENDIX D

ORDER

MICHIGAN SUPREME COURT

ENTERED: December 5, 1990

EVERT ROMEIN,
Plaintiff-Appellee,

and

ATTORNEY GENERAL
FRANK J. KELLEY,
Intervenor-Appellee,

SC: 83830
COA: 101298
LC: WCAB NO. 373

v.

GENERAL MOTORS
CORPORATION,
Defendant-Appellant.

ARTURO GONZALEZ,
Plaintiff-Appellee,

and

ATTORNEY GENERAL
FRANK J. KELLEY,
Intervenor-Appellee,

SC: 83831
COA: 101510
LC: WCAB No. 108

v.

FORD MOTOR COMPANY,
Defendant-Appellant

Supreme Court of Michigan

December 27, 1990, Entered

In this cause, a motion for rehearing is considered and, on order of the Court, it is hereby DENIED.

The motion by the Michigan Association of Insurance Companies and others for leave to file a brief *amicus curiae* is considered and it is GRANTED. The motion by the Michigan Self-Insurer's Association for leave to file a brief *amicus curiae* is also considered and it is DENIED.

Riley, C.J., and Griffin, J., would grant rehearing.

APPENDIX E

Opinion of Workers' Compensation Appeal Board

DEC. #373

STATE OF MICHIGAN

WORKERS' COMPENSATION APPEAL BOARD

EVERT ROMEIN,
SS #362-46-5198
PLAINTIFF,

vs.

GENERAL MOTORS CORPORATION,
PONTIAC MOTOR DIVISION,
DEFENDANT.

APPEAL FROM
ADMINISTRATIVE LAW JUDGE LAPORTE

DECISION ON REVIEW

ZURVALEC, MEMBER OF THE APPEAL BOARD

Plaintiff, born June 2, 1912, was working as a welder for defendant on or about December 5, 1977, when he fell 25 feet from a ladder after being struck by a swinging door. He sustained fractures to his pelvis and right rib. Defendant began to pay workers' compensation benefits to him on a voluntary basis. Subsequently, plaintiff filed a petition for hearing received September 24, 1979, alleging personal injury or disablement from occupational disease occurring on or about December 5, 1977, in the nature of fractures of the pelvis and left hip, industrial loss of use of both legs and disability from the field of skilled labor.

Hearings were held October 15 and November 14, 1980, before Administrative Law Judge Leo LaPorte. By decision

mailed December 18, 1980, the administrative law judge found that plaintiff had received a personal injury arising out of and in the course of his employment in skilled labor on December 5, 1977, and that plaintiff was disabled. He further found, however, that plaintiff had not sustained the burden of proving total and permanent disability, dismissed the Second Injury Fund and ordered defendant to continue paying weekly maximum payments, reduced by age and medical care. Plaintiff's timely appeal of this decision was dismissed at his request by Board order mailed February 6, 1981.

On July 22, 1982, defendant filed a Form 107 Notice of Dispute stating that it would begin to coordinate plaintiff's workers' compensation benefits due after March 31, 1982, the effective date of § 418.354. Plaintiff filed a petition for hearing received November 16, 1983, containing the same allegations as his original petition. By letter dated November 14, received November 15, 1983, plaintiff's counsel requested a Rule V hearing because of defendant's alleged termination of benefits, asking for recoupment and application of penalty. A hearing was held May 14, 1984, before Administrative Law Judge LaPorte, who by decision mailed June 28, 1984, found that:

> "Section 354 is not retro-active. Defendant must pay in accordance with the decision mailed 12/18/80, or attempt to modify the decision. Interest of 12% applies to the amounts incorrectly withheld. Defendant will pay $1500.00 penalty. The filing of a Notice of Dispute does not constitute a dispute when an open award exists."

Defendant filed an appeal of this decision received July 9, 1984.

After the administrative law judge's decision mailed June 28, 1984, defendant filed a Motion to Stay applica-

tion of Section 418.862 (payment of 70% benefits pending appeal) which was denied by Board order mailed January 9, 1985. Then plaintiff filed a Motion to Dismiss defendant's appeal of the June 28, 1984, decision for failure to pay either 70% or 100% benefits which was also denied by this Board in an order mailed April 4, 1985. Plaintiff began to file petitions for Rule V penalty hearings for failure to pay full amount of 70% benefits accrued, received April 8, April 18, May 7, May 24, June 21, October 8, September 30, and October 7, 1985. Administrative Law Judge LaPorte held a hearing on November 20, 1985, thereafter issuing a decision mailed April 9, 1986, in which he found:

FINDINGS OF FACT:

> This case is submitted by briefs. Decision mailed 6-28-84 required payment without co-ordination, 12% interest, and $1,500.00 penalty. Plaintiff was receiving alternate benefit's. (sic)

CONCLUSIONS OF LAW:

> *Chambers v. General Motors Corp., 422* Mich. *636*, issued 10/7/85 determined that coordination was retroactive. This had been defendant's position. Plaintiff was THUS overpaid. It would be pointless and needlessly rigid to require further overpayments because of procedural technicalities.

Administrative Law Judge LaPorte's decision mailed April 9, 1986, was not appealed by either party. Consequently, the only decision before us on appeal is that of June 28, 1984, which the Administrative Law Judge declined to enforce in later proceedings.

We hereby reverse the administrative law judge's holding that MCLA 418.354 could not be applied retroactively. *Chambers* v. *General Motors Corp.*, 422 Mich. 636 (1985) held that the set off provided for in Section 354 applies

to benefits attributable to periods after March 31, 1982, the effective date of the Act, regardless of the date of injury. Defendant is entitled to coordinate plaintiff's pension and social security old age benefits after March 31, 1982 pursuant to Section 354(1)(a)(d) and (7). We modify the award of interest from 12% to 10% on all unpaid weekly compensation, if any, from due dates until paid. *Civil Service Commission* v. *Department of Labor*, 424 Mich. 571 (1986); *Selk* v. *Detroit Plastic Products*, 419 Mich. 1 (1984) (On Resubmission) 419 Mich. 32 (1984). We reverse the award of $1,500.00 penalty which the administrative law judge declined to enforce himself in his decision mailed April 9, 1986.

Plaintiff requests that we order defendant to make an accounting of all benefits reduced or coordinated to date under either Section 354 or Section 357 of the Act. Defendant filed a Form 101, received by the Bureau October 25, 1985, indicating plaintiff's average weekly wage at $370.40, one dependent, a weekly compensation base rate of $99.00, Social Security coordination of $81.41 plus a compensation supplement of $21.00. Plaintiff has not provided any figures for us to compare against the Form 101. There is no indication whatsoever in the file that any benefits were improperly coordinated prior to March 31, 1982. With no argument raised beyond a vague uncertainty that benefits might have been improperly coordinated, we are not persuaded such an accounting is appropriate and decline to so order.

Member Batts concurs.

Dated and entered at Lansing, Michigan, this 20th day of May, A.D. 1987;

WORKERS' COMPENSATION
APPEAL BOARD

Lori A. Zurvalec

Derek T. Batts Members

Opinion of Workers' Compensation Appeal Board

DEC. #373

STATE OF MICHIGAN

WORKERS' COMPENSATION APPEAL BOARD

EVERT ROMEIN,
SS #362-46-5198
PLAINTIFF,

vs.

GENERAL MOTORS CORPORATION,
PONTIAC MOTOR DIVISION,
DEFENDANT.

This cause having come before the Appeal Board on appeal by defendant from the decision mailed on June 28, 1984, of Administrative Law Judge Leo LaPorte, denying retroactive coordination of compensation benefits pursuant to MCLA Section 418.354(1); after due consideration of the evidence taken and the briefs of counsel, the Board having made a finding of facts and law, and it appearing to the undersigned Members of the Board that the decision made as aforesaid should be reversed in part and modified in part, Now, Therefore;

IT IS ORDERED, That the decision of the administrative law judge in this cause shall be and it hereby is reversed as to the retroactivity of MCLA Section 418.354(1) and the award of $1,500.00 penalty;

IT IS FURTHER ORDERED That interest on all unpaid weekly compensation, if any, from due dates until paid shall be at the rate of 10% per annum. *Civil Service Commission* v. *Department of Labor*, 424 Mich. 571

(1986); *Selk* v. *Detroit Plastic Products*, 419 Mich. 1 (1984) (On Resubmission) 419 Mich. 32 (1984).

Dated and entered at Lansing, Michigan, this 20th day of May, A.D. 1987;

WORKERS' COMPENSATION
APPEAL BOARD

Lori A. Zurvalec

Derek T. Batts Members

Opinion of Workers' Compensation Appeal Board

OPN. #108

STATE OF MICHIGAN

WORKERS' COMPENSATION APPEAL BOARD

ARTURO GONZALEZ,
SS #365-36-5761
PLAINTIFF,

vs.

FORD MOTOR COMPANY,
DEFENDANT.

APPEAL FROM
ADMINISTRATIVE LAW JUDGE FOSTER
JAMES M. O'REILLY FOR THE PLAINTIFF,
MARTIN L. CRITCHELL & ALAN S. GOROSE
FOR THE DEFENDANT.

OPINION ON REVIEW

GOOLSBY, MEMBER OF THE APPEAL BOARD

Defendant appeals from the decision, mailed October 10, 1984, of Administrative Law Judge Andrew Foster that "defendant improperly coordinated and reduced benefits due and owing plaintiff."

The administrative law judge further found that "MCLA 418.354 does not apply retrospectively to plaintiff's claim since plaintiff's injuries of January 1, 1981 were prior to the effective date of the Act." The administrative law judge also assessed a $1,500.00 penalty against defendant for its failure to pay full weekly benefits for all violations which occurred prior to filing Notice of Dispute, July 29, 1982. We reverse.

At the time this dispute arose, plaintiff was being paid weekly compensation at the rate of $176.00 pursuant to a voluntary agreement of the parties, dated September 24, 1981.

The dispute was submitted to the administrative law judge on a stipulated set of facts:

We further find that the assessment of a penalty in this case was improper. Pursuant to Section 801(2), penalties are assessable only when compensation is due and payable and there is no ongoing dispute between the parties. The *Chambers* court rejected the requirement that an employer must file a petition before coordinating benefits under Section 354:

> "Section 354 contains no provision requiring the employer to file a petition and present proofs at an evidentiary hearing prior to coordinating an employee's benefits. The express language of subsection (10) makes it clear that what is required of the employer is that it report the credit or reduction in benefits and provide proof of the basis for it if requested by the Bureau." At 661.

The file contains such a report, Form 101-b.

The *Chambers* court determined that such a procedure does not deny due process, because if insufficient evidence is presented or the director is not satisfied that the Act is not being complied with, he or she may convene a Rule 5 hearing. If the claimant is not satisfied with the director's actions, he or she may file for a hearing pursuant to MCL 418.847; MSA 17.237(847); AC, R 408.34. *Chambers*, *supra*, at 661-662.

Although we have concluded that the administrative law judge was wrong in his decision, we note that the Legislature has recently enacted 1987 PA 28, with immediate

effect, which unequivocally reverses the ruling, in *Chambers*, *supra*. The following language has been added to Section 354:

> "(17) The decision of the Michigan Supreme Court in *Franks* v. *White Pine Copper Division*, 422 Mich. 636 (1985) is declared to have been erroneously rendered insofar as it interprets this section, it having been and being the legislative intention not to coordinate payments under this section resulting from liability pursuant to section 351, 361, 835 for personal injuries occurring before March 31, 1982. It is the purpose of this amendatory act to so affirm. This remedial and curative amendment shall be liberally construed to effectuate this purpose."

Accordingly, the administrative law judge is reversed, but defendant must now comply with the dictates of 1987 PA 28.

> "Petitioner, ARTURO GONZALEZ, was employed by the Ford Motor Company from June 9, 1953, until December 31, 1980. Upon retirement from Defendant Company he filed a Workers' Compensation Claim, alleging, among other things, that he developed a disabling lung condition as a consequence of his foundry exposure for the previous twenty years.
>
> Physical examinations performed during the pendency of his claim proved conclusively that he suffered from silicosis in both lungs. Submission of these medical reports to the Silicosis and Dust Disease Fund resulted in an agreement that they would reimburse Defendant Company for all weekly benefits paid in excess of Twelve Thousand Five Hundred ($12,500.00) Dollars.
>
> A Voluntary Payment Form was submitted to the Bureau on September 24, 1981, signed by the counsel for both parties, stating that weekly benefits of $176.00 were to be paid to Petitioner from January 1, 1981, on a continuing basis and further stating that

the Silicosis and Dust Disease Fund had agreed to reimburse Ford Motor Company for all weekly benefits paid in excess of $12,500.00, pursuant to the statute.

In a letter dated August 9, 1982, Petitioner was informed that, effective March 31, 1982, weekly benefits were being reduced as provided by Section 418.354 of the Act. This reduced his weekly benefit rate from $176. to $0."

Both counsel apparently submitted briefs on the matter to the administrative law judge although the file only contains that of plaintiff.

In *Chambers* v. *General Motors Corp.*, 422 Mich. 636 (1985), the Supreme Court determined that MCL 418.354 is procedural, and applies retroactively, regardless of the date of injury. Thus, the holding in *Chambers* negates the basis of the decision of the administrative law judge in this case.

Pursuant to the *Chambers* holding, defendant was within its right to coordinate plaintiff's pension benefit effective March 31, 1982, the date that Section 354 became effective. The fact that defendant was entitled to reimbursement from the Silicosis and Dust Disease Fund for all weekly benefits paid in excess of $12,500 did not affect defendant's right to apply the provisions of Section 354.

Because of this recent amendment, we see no reason to address defendant's reimbursement issue, as it is now moot.

Member Smith concurs.

Dated and entered at Lansing, Michigan, this 27th day of May, A.D. 1987;

WORKERS' COMPENSATION
APPEAL BOARD

Garry Goolsby

Sharon L. Smith Members

Opinion of Workers' Compensation Appeal Board

OPN. #108

STATE OF MICHIGAN

WORKERS' COMPENSATION APPEAL BOARD

ARTURO GONZALEZ,
SS #365-36-5761
PLAINTIFF,

vs.

FORD MOTOR COMPANY,
DEFENDANT.

This cause having come before the Appeal Board on appeal by defendant from the decision mailed on October 10, 1984, of Administrative Law Judge Foster, denying defendant the right to coordinate benefits pursuant to MCL 418.354 and assessing a penalty of $1,500 against defendant; after due consideration of the stipulated facts presented and the briefs of counsel, the Board having made a finding of facts and law, and it appearing to the undersigned Members of the Board that the decision made as aforesaid should be reversed, Now, Therefore;

IT IS ORDERED, That the decision of the judge in this cause shall be and it hereby is reversed.

Dated and entered at Lansing, Michigan, this 27th day of May, A.D. 1987;

WORKERS' COMPENSATION
APPEAL BOARD

Garry Goolsby

Sharon L. Smith Members

APPENDIX F

1. Article I, Section 10 of the United States Constitution provides in relevant part:

> No State shall * * * pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts.

2. The Fourteenth Amendment to the United States Constitution, Section 1, provides in relevant part:

> [n]or shall any state deprive any person of life, liberty, or property, without due process of law.

3. Michigan Statute Annotated § 418.354 provides in relevant part:

> (1) This section is applicable when either weekly or lump sum payments are made to an employee as a result of liability pursuant to section 351, 361, or 835 with respect to the same time period for which old-age insurance benefit payments under the social security act, 42 U.S.C. 301 to 1397f; payments under a self-insurance plan, a wage continuation plan, or a disability insurance policy provided by the employer; or pension or retirement payments pursuant to a plan or program established or maintained by the employer, are also received or being received by the employee. Except as otherwise provided in this section, the employer's obligation to pay or cause to be paid weekly benefits other than specific loss benefits under section 361(2) and (3) shall be reduced by these amounts:
>
> (a) Fifty percent of the amount of the old-age insurance benefits received or being received under the social security act.
>
> (b) The after-tax amount of the payments received or being received under a self-insurance plan, a wage continuation plan, or under a disability insurance policy provided by the same employer from whom benefits under section 351, 361, or 835 are received if the employee di not

> contribute directly to the plan or to the payment of premiums regarding the disability insurance policy. If such self-insurance plans, wage continuation plans, or disability insurance policies are entitled to repayment in the event of a worker's compensation benefit recovery, the carrier shall satisfy such repayment out of funds the carrier has received through the coordination of benefits provided for under this section. Notwithstanding the provisions of this subsection, attorney fees shall be paid pursuant to section 821 to the attorney who secured the worker's compensation recovery.
>
> (c) The proportional amount, based on the ratio of the employer's contributions to the total insurance premiums for the policy period involved, of the after-tax amount of the payments received or being received by the employee pursuant to a disability insurance policy provided by the same employer from whom benefits under section 351, 361, or 835 are received, if the employee did contribute directly to the payment of premiums regarding the disability insurance policy.
>
> (d) The after-tax amount of the pension or retirement payments received or being received pursuant to a plan or program established or maintained by the same employer from whom benefits under section 351, 361, or 835 are received, if the employee did not contribute directly to the pension or retirement plan or program. Subsequent increases in a pension or retirement program shall not affect the coordination of these benefits.
>
> (e) The proportional amount, based on the ratio of the employer's contributions to the total contributions to the plan or program, of the after-tax amount of the pension or retirement payments received or being received by the employee pursuant to a plan or program established or maintained by the same employer from whom bene-

fits under sections 351, 361, or 835 are received, if the employee did contribute directly to the pension or retirement plan or program. Subsequent increases in a pension or retirement program shall not affect the coordination of these benefits.

(f) For those employers who do not provide a pension plan, the proportional amount, based on the ratio of the employer's contributions to the total contributions made to a qualified profit sharing plan under section 401(a) of the Internal Revenue Code or any successor to section 401(a) of the Internal Revenue Code covering a profit sharing plan which provides for the payment of benefits only upon retirement, disability, death, or other separation of employment to the extent that benefits are vested under the plan.

* * * * *

(9) Except as otherwise provided in this section, any benefit payments under the Social Security Act, or any fund, policy, or program as specified in subsection (1) which the employee has received or is receiving after March 31, 1982 and during a period in which the employee was receiving unreduced compensation benefits under section 351, 361, or 835 shall be considered to have created an overpayment of compensation benefits for that period. The employer or carrier shall calculate the amount of the overpayment and send a notice of overpayment and a request for reimbursement to the employee. Failure by the employee to reimburse the employer or carrier within 30 days after the mailing date of the notice of request for reimbursement shall allow the employer or carrier with the approval of the bureau to discontinue 50% of future weekly compensation payments under section 351, 361 or 835. The compensation payments withheld shall be credited against the amount of the overpayment. Payment of the appropriate compensation benefit shall resume when the total amount of the overpayment has been withheld.

(10) The employer or carrier taking a credit or making a reduction as provided in this section shall immediately report to the bureau the amount of any credit or reduction, and as requested by the bureau, furnish to the bureau satisfactory proof of the basis for a credit or reduction.

* * * * *

(17) The decision of the Michigan Supreme Court in *Franks v. White Pine Copper Division*, 422 Mich. 636 (1985) is declared to have been erroneously rendered insofar as it interprets this section, it having been and being the legislative intention not to coordinate payments under this section resulting from liability pursuant to section 351, 361, or 835 for personal injuries occurring before March 31, 1982. It is the purpose of this amendatory act to so affirm. This remedial and curative amendment shall be liberally construed to effectuate this purpose.

(18) This section applies only to payments resulting from liability pursuant to section 351, 361, or 835 for personal injuries occurring on or after March 31, 1982. Any payments made to an employee resulting from liability pursuant to section 351, 361, or 835 for a personal injury occurring before March 31, 1982 that have not been coordinated under this section as of the effective date of this subsection shall not be coordinated, shall not be considered to have created an overpayment of compensation benefits, and shall not be subject to reimbursement to the employer or carrier.

(19) Notwithstanding any other section of this act, any payments made to an employee resulting from liability pursuant to section 351, 361, or 835 for a personal injury occurring before March 31, 1982 that have been coordinated before the effective date of this subsection shall be considered to be an underpayment of compensation benefits, and the amounts withheld pursuant to coordination shall be reimbursed with interest, within 60 days of the effective date of

this subsection, to the employee by the employer or carrier.

(20) Notwithstanding any other section of this act, any employee who has paid an employer or carrier money alleged by the employer or carrier to be owed the employer or carrier because that employee's benefits had not been coordinated under this section and whose date of personal injury was before March 31, 1982 shall be reimbursed with interest, within 60 days of the effective date of this subsection, that money by the employer or carrier.

(21) If any portion of this section is subsequently found to be unconstitutional or in violation of applicable law, it shall not affect the validity of the remainder of this section.

4. Michigan Statute Annotated § 418.833 provides in relevant part:

(1) If payment of compensation is made, other than medical expenses, and an application for further compensation is later filed with the bureau, no compensation shall be ordered for any period which is more than 1 year prior to the date of filing of such application.

APPENDIX G

RULE 29.1 LIST OF SUBSIDIARY COMPANIES

Ford Motor Company has no parent corporation. The following is a list of domestic and foreign companies in which Ford Motor Company owns a significant (not necessarily controlling) interest, but which are not wholly-owned by Ford:

United States of America

American Renaissance Insurance Company
Autolatina America, Inc.
Dearborn Capital Corporation
Dobco Life Insurance Company
Fairlane Life Insurance Company
Ford Holdings, Inc.
Jaguar Cars Inc.
Lincoln-Rowe Management
Shoppers Mart, Inc.
The Hertz Corporation

Argentina

Autolatina Argentina S.A. de Ahorro Para Fines Determinados
Invercred Compania Financiere S.A.
Jaguar Holdings Limited
Transax Sociedad Anonima, Comercial Industrial y Financiera
Volkswagen Inversiones S.A.
Volkswagen Sociedad Anonima de Ahorro Para Fines Determinados

Australia

Australian Road Credit Limited
Ford Credit Australia Limited
Ford Credit Australia Wholesale Limited
Ford Motor Company of Australia Limited
Ford New Holland Australia Limited
Ford Sales Company of Australia Limited
New Holland Holdings Pty., Limited
Oscrite Limited

Austria

Ford Bank Aktiengesellschaft
Ford Motor Company (Austria) K.G.

Belgium

Ford Credit N.V.
Ford Motor Company (Belgium) N.V.
Ford Tractor (Belgium) Limited

Brazil

Apolo—Administradora de Bens S/C Ltda.
Autolatina Distribuidora de Titulos e Valores Mobiliaros Ltda.
Autolatina Financiadora S.A.—Credito, Financiamente e Invest.
Autolatina Leasing S/A—Arrandamente Mercantil
Autolatina Previdencia Privada
Autolatina S.A.
Consorcio Nacional Ford Ltda.
Consorcio Nacional Volkswagen Ltda.
Ford Brasil S.A.
Ford Distribuidora de Productos de Petroleo Ltda.
Fundacao Autolatina
Inter-Locadora S/A
Sociedade Paulista de Aparelhos Domesticos "SPAD" Ltda.
Transglobal Corretagen de Seguros Ltda.
Volkswagen de Brasil S/A
Volkswagen Factoring—Fomento Comercial S/A

Canada

Canadian Road Credit Company
Ford Credit A/S
Ford Credit Canada Limited
Ford Motor Company of Canada, Limited
Halla Climate Control Canada, Inc.
Jaguar Canada, Inc.

Denmark

Ford Motor Company A/S
Ford New Holland Scandinavia A/S

England

Aston Martin (RDP) Limited
Aston Martin Finance Limited
Aston Martin Lagonda Design Limited
Aston Martin Lagonda Limited
Aston Martin Lagonda U.S.A., Inc.
Aston Martin Sales Limited
Auto Club International Limited
Automotive Finance Limited
Ford Automotive Leasing Limited
Ford Motor Company Limited
Ford Personal Import Export Ltd.
Jaguar Cars Exports Limited
Jaguar Cars Limited
Jaguar Insurance Limited
Jaguar International Finance Ltd.
Jaguar Limited
Jaguar Sports Limited
Lagonda Properties Limited
The Jaguar Collection Limited
Venture Pressings Limited

Finland

Oy Ford Ab

France

Ford France S.A.
Ford New Holland S.A.

Germany

Ford Versorgungs-Und Unterstutzungseinrichtung GmbH

Holland

Ford Nederland B.V.

Mexico

Implementos Agricolas Mexicanos, S.A.
ACONA B.V.

New Zealand

Ford Motor Credit Company
of New Zealand Limited

Norway

Ford Motor Norge A.S.
Ford New Holland A/S

Philippines

Ford Philippines, Inc.

Puerto Rico

Puerto Ricancars, Incorporated

Sweden

Ford Credit AB
Ford Motor Company Aktiebolag

Switzerland

Ford Credit S.A.

Taiwan

Ford Enterprise Company Taiwan, Ltd.
Ford Taiwan Services, Limited

Oy Ford Credit Rahoitus
Transcon Insurance Limited

APPENDIX H

The non-wholly owned subsidiaries of respondent General Motors Corporation are:

ACCSCO S.A. (Belgium)
ACE Limited (Cayman Islands)
AMBRAKE Corporation (USA)
AMRAAM International Licensing Company (USA)
AeroVironment, Inc. (USA)
Alliance Development Corporation (USA)
American Manufacturing Systems, Inc. (USA)
American Mobile Satellite Consortium, Inc. (USA)
Applied Intelligent Systems, Inc. (USA)
Aralmex, S.A. de C.V. (Mexico)
ARINC Incorporated (USA)
Asset Leasing GmbH (West Germany)
Atlantic Satellites Ltd. (Ireland)
Aura s.r.l. (Italy)
Autos y Maquinas del Ecuador S.A. (AYMESA) (Ecuador)
Avicom International, Inc. (USA)
Banque de Credit General Motors (France)
Behaviortech, Inc. (USA)
Beijing International Information Processing Company Limited (Peoples Republic of China)
British Caledonian Flight Training Limited (England)
Bujias Mexicanas, S.A. de C.V. (Mexico)
CAMI Automotive, Inc. (Canada)
CEI Co., Ltd. (USA)
Calsonic Harrison Co., Ltd. (Japan)
Carus Grundstucks-Vermietungsgesellschaft mbH & Co. Object Kuno 65 KG (Federal Republic of Germany)
Carus Grundstucks-Vermietungsgesellschaft mbH & Co. Object Leo 40 KG (Federal Republic of Germany)
China Management Systems Corporation (China)
Cilva Holdings Plc. (England and Wales)
Cimflex Teknowledge (USA)

Coalition Undertaking Remedial Efforts, Inc. (USA)
Comau Productivity Systems, Inc. (USA)
Compagnie de Faisceaux Tunisian International S.A. (Tunisia)
Compania Nacional de Direcciones Automotrices, S.A. de C.V. (Mexico)
Componentes Delfa, C.A. (Venezuela)
Comtrac Corporation (USA)
Constructora Venezolana de Vehiculos, C.A. (Venezuela)
Convesco Vehicles Sales GmbH (West Germany)
DHB-Componentes Automotivos S.A. (Brazil)
Daewoo Automotive Components, Ltd. (Korea)
Daewoo Motor Co., Ltd. (Korea)
Data Services America, Inc. (USA)
Delkor Battery Company, Ltd. (Korea)
Detroit Diesel Corporation (USA)
Diavia s.p.A. (Italy)
EDESA Societe Anonyme Holding (Luxembourg)
E.D.S. Federal Services Corporation (USA)
E.D.S.W.-Mexico S.A. de C.V. (Mexico)
ELTRO GmbH (Federal Republic of Germany)
EPEC S.A. (Brazil)
Earth Observation Satellite Company (USA)
ELEKLUFT Elektronik-und Luftfahrtgerate GmbH (Federal Republic of Germany)
Empresa Mixta GEMACVEN, S.A. (Venezuela)
European Components Corporation (USA)
Fabrica Colombiana de Automotores S.A. ("Colomotores") (Columbia)
Federal Integrated Systems Corporation (USA)
First City Corp. (USA)
G & F Company (USA)
GM Allison Japan Limited (Japan)
GMACC Financiera de Colombia S.A. Compania de Financiamiento Comercial (Colombia)
GMAC RF, Inc. (USA)
GMFanuc Robotics Canada Ltd. (Canada)
GMFanuc Robotics Corporation (USA)
GMFanuc Robotics Europe GmbH (West Germany)

GMFanuc Robotics Italia S.r.l. (Italy)
GMFanuc Robotics (U.K.) Ltd. (England)
GMFanuc Robotique France S.A.R.L. (France)
General Motors Bankgesellschaft m.b.H. (Austria)
General Motors del Ecuador S.A. (Ecuador)
General Motors Egypt (Arab Republic of Egypt)
General Motors France Automobiles S.A. (France)
General Motors Holdings (U.K.) Limited (England)
General Motors Kenya Limited (Kenya)
Genie Mecanique Zairose, S.A.R.L. (Republic of Zaire)
H & R Company (USA)
HBH Company (USA)
HKV (USA)
Hitachi Data Systems Holding Corporation (USA)
Hughes Data Systems (USA)
Hughes-Kenwood RDSS, Inc. (USA)
Hughes Microelectronics Europa Espana, S.A. (Spain)
Hughes Microelectronics Europa Limited (Scotland)
IBC Vehicles Limited (United Kingdom)
I.K. Coach Co., Limited (Japan)
ITC Inland Teknik Oto Yan Sanayi Sirketi (Turkey)
Ilmor Engineering, Inc. (USA)
Ilmor Engineering, Ltd. (England)
Industries Mecaniques Maghrebines, S.A. (Tunisia)
Industrija Delova Automobila, Kikinda (Yugoslavia)
Infocel, Inc. (USA)
Interactive Entertainment, Inc. (Canada)
International Electro-Optical Industry Anonim Sirketi (Turkey)
Interpractice Systems, Inc. (USA)
Isuzu-General Motors Australia Limited (Australia)
Isuzu Motors Limited (Japan)
Japan Communications Satellite Company, Inc. (Japan)
Japan Satellite Communications Network Corporation (Japan)
Kabelwerke Reinshagen GmbH (West Germany)
Kabelwerke Reinshagen Werk Berlin GmbH (West Germany)

Kabelwerke Reinshagen Werk Neumarkt GmbH (West Germany)
Koram Plastics Company, Ltd. (Korea)
MET (USA)
Mecel AB (Sweden)
Metal Casting Technology, Inc. (USA)
Millbrook Pension Management Ltd. (England)
NCRS Holdings Inc. (USA)
National Car Rental Systems, Inc. (USA)
Neodata Holdings, Inc. (USA)
New United Motor Manufacturing, Inc. (USA)
New Venture Gear, Inc. (USA)
Nippon Avionics Co., Ltd. (Japan)
Nippon EDS Co., Ltd. (Japan)
ORRCO, Inc. (USA)
Omnibus BB Transportes, S.A. (Ecuador)
Opel-Automobilwerk Eisenach-PKW GmbH (Germany)
Opel-Handler Versicherungsdienst GmbH (Federal Republic of Germany)
Opel-Wohnbau GmbH (West Germany)
P.T. Mesin Isuzu Indonesia (Indonesia)
PDES, Inc. (USA)
Pacific Monolithics, Inc. (USA)
Packard CTA Pty. Ltd. (Australia)
Packard Electric Vas kft (Hungary)
Penske Transportation, Inc. (USA)
Perceptron (USA)
Promotora de Partes Electricos Automotrices (Mexico)
Rediffusion Simultation Tulsa, Inc. (USA)
Residential Funding Corporation (USA)
Robotic Vision Systems, Inc. (USA)
Ruedas de Aluminio, C.A. (Venezuela)
Saab Automobile AB (Sweden)
Senalizacion y Accessorios del Automovil Yorka, S.A. (Spain)
Shinsung Packard Company, Ltd. (Korea)
Sociedad de Comercializacion Internacional Colmotores S.A. (Colombia)

Societe Francaise des Amortisseurs de Carbon S.A. (France)
Soft-Switch, Inc. (USA)
Subaru-Isuzu Automotive, Inc. (USA)
Sung San Company, Ltd. (South Korea)
Suzuki Motor Corporation (Japan)
Systems Technology Management Corporation (Korea)
T.A.D. Communications Company (USA)
T.A.D. Communications Company International (USA)
Tactical Truck Corporation (USA)
Telecommunications Data Service, Incorporated (USA)
Terminales Electricas, S.A. de C.V. (Mexico)
Thomas Group, Inc. (USA)
3DK Limited (United Kingdom)
Transallison S.A. (Brazil)
Truck and Bus Engineering U.K., Limited (USA)
UKADGE Systems Limited (United Kingdom)
Unitech, Inc. (USA)
United Australian Automotive Industries Limited (Australia)
United Motor Manufacturing, Inc. (USA)
Uveral S.A. (Uruguay)
Vanguarda Componentes Automotivas, S.A. (Brazil)
View Engineering, Inc. (USA)
Volvo GM Canada Heavy Truck Corporation (Canada)
Volvo GM Heavy Truck Corporation (USA)
Westcott Communications, Inc. (USA)